

# INDIANA LAW REVIEW

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## IN MEMORY OF MARY HARTER MITCHELL

Editor-in-Chief's Introduction:  
Tribute to the Late Mary Harter Mitchell  
*Kate Mercer-Lawson*

A Tribute to Professor Mary Mitchell  
*Susanah M. Mead*

Mary Harter Mitchell  
*Florence Wagman Roisman*

Reflections on the Life of Mary Mitchell  
*Joan M. Ruhtenberg*

The Poetry of Mary Harter Mitchell

## ARTICLES

Some Thoughts on the State of Women Lawyers and Why Title VII  
Has Not Worked for Them  
*Theresa M. Beiner*

"The Mess We're in": Five Steps Towards the Transformation of Prison Cultures  
*Lynn S. Branham*

Renaissance or Retrenchment: Legal Education at a Crossroads  
*Lauren Carasik*

The "Turning-Out" of Boys in a Man's Prison: Why and How We Need to Amend  
the Prison Rape Elimination Act  
*James E. Robertson*

The Changing Supreme Court and Prisoners' Rights  
*Christopher E. Smith*

## NOTES

Making a List, but Checking It Twice?  
Indiana's Foster Roster and the Need for Licensing Reform  
*Courtney Andreone*

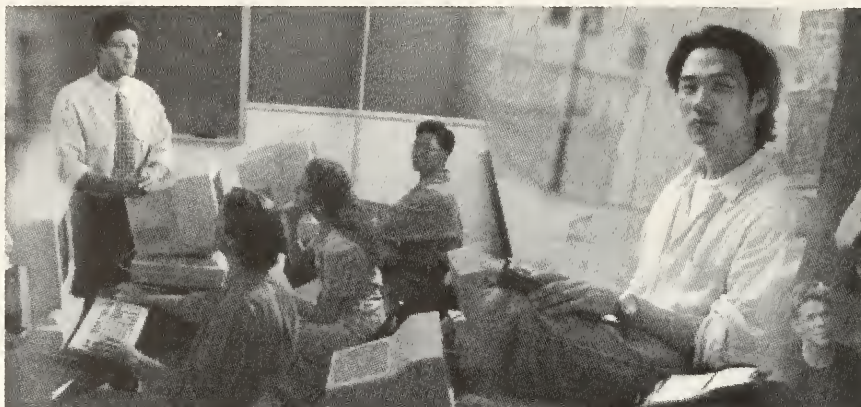
Not in My Library: An Examination of State and Local Bans of Sex Offenders  
from Public Libraries  
*Jennifer Ekblaw*

Indiana's "Three Strikes" Inmate Litigation Limitations:  
2009 Legislation Does Not Hit a Home Run  
*Amanda L.B. Mulroony*



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2010-2011

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(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

*Indiana Law Review*  
Lawrence W. Inlow Hall  
530 W. New York Street  
Indianapolis, IN 46202-3225  
(317) 274-4440

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The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic \$30.00; foreign \$35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University School of Law—Indianapolis, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.


POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.



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## TABLE OF CONTENTS

### IN MEMORY OF MARY HARTER MITCHELL

Editor-in-Chief's Introduction:

Tribute to the Late Mary Harter Mitchell . . . *Kate Mercer-Lawson* 657

### TRIBUTES

A Tribute to Professor Mary Mitchell . . . . . *Susanah M. Mead* 659

Mary Harter Mitchell . . . . . *Florence Wagman Roisman* 667

Reflections on the Life of Mary Mitchell . . . . . *Joan M. Ruhtenberg* 671

The Poetry of Mary Harter Mitchell . . . . . 675

### ARTICLES

Some Thoughts on the State of Women Lawyers and Why Title VII  
Has Not Worked for Them . . . . . *Theresa M. Beiner* 685

“The Mess We’re in”: Five Steps Towards the Transformation  
of Prison Cultures . . . . . *Lynn S. Branham* 703

Renaissance or Retrenchment: Legal Education at  
a Crossroads . . . . . *Lauren Carasik* 735

The “Turning-Out” of Boys in a Man’s Prison: Why and How  
We Need to Amend the  
Prison Rape Elimination Act . . . . . *James E. Robertson* 819

The Changing Supreme Court and Prisoners’ Rights . *Christopher E. Smith* 853

### NOTES

Making a List, but Checking It Twice? Indiana’s Foster Roster  
and the Need for Licensing Reform . . . . . *Courtney Andreone* 889

Not in My Library: An Examination of State and Local Bans of  
Sex Offenders from Public Libraries . . . . . *Jennifer Ekblaw* 919

Indiana’s “Three Strikes” Inmate Litigation Limitations:  
2009 Legislation Does Not Hit  
a Home Run . . . . . *Amanda L.B. Mulroony* 957





## ADDENDUM

Addendum to *Professor Henry C. Karlson, A Remembrance*, 44 IND. L. REV. 353 (2011).

The author, Dean Emeritus William F. Harvey, inadvertently omitted quotation marks that appear below in quotation marks with a footnote. They are added to the second full paragraph on page 354 as follows:

When I think about Henry, my mind turns to one piece of music in particular. “With its trumpets and bouncing tempo, it is the third movement of Bach’s Brandenburg Concerto No. 2 in F Major. It summons images of a carefree nobleman who is dancing. Usually it carries the instruction, ‘allegro assai,’ Italian for very joyful and fast.”<sup>1</sup> I hope it is unnecessary to say that in using that musical metaphor I am not describing how he danced. I am describing his mental and intellectual agility, his wit, and his patterns of thought, some of which came so fast they were similar to a fast and joyful dance.

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1. This interpretation of Bach’s Concerto No. 2 appears in a comment on William F. Buckley’s use and interpretation of Bach’s music that was played during the memorial service for William F. Buckley, Jr., who died on February 27, 2008. See Anthony Ramirez, *2,200 Fill St. Patrick’s for Buckley’s Memorial*, N.Y. TIMES, Apr. 5, 2008, available at <http://www.nytimes.com/2008/04/05/nyregion/05buckley.html>. The Ramirez interpretation is very similar to an explanation Mr. Buckley gave to Dean Harvey in a private discussion in March 1983. It is used here in metaphorical form to illuminate the refreshing, bouncing tempo and the trumpet-like statements in Professor Karlson’s patterns of thought.







**MARY HARTER MITCHELL**





## EDITOR-IN-CHIEF'S INTRODUCTION: TRIBUTE TO THE LATE MARY HARTER MITCHELL

KATE MERCER-LAWSON\*

American novelist Henry Brooks Adams once noted that “[a] teacher affects eternity; he can never tell where his influence stops.”<sup>1</sup> This quotation indubitably applies to Professor Mary Harter Mitchell, whose influence on this law school’s most recent graduating class began on August 23, 2008. It was during our “Call to the Profession” ceremony that Professor Mitchell provided a breath of fresh air after days of mounting fear of the Socratic method and three-hour exams. Exuding joy and hope, she reassured us that we were following a very noble path from which we would emerge as better persons. The following spring, she continued providing intelligent and compassionate instruction to one section of our class as a contracts instructor. She also influenced our class through her constant involvement in student activities, her visibility on campus, her mentoring of law review students, and her upper-level seminars. Having majored in religious studies, I was extremely disappointed not to have made it off the waiting list for her church and state class and had planned to enroll the following semester. But on November 4, 2009, I knew I would never be so fortunate. That day, all of the students, faculty, and staff of the Indiana University School of Law—Indianapolis realized that a woman whose influence we had perhaps taken for granted had left us too soon.

Not content to say farewell once, the 2011 class of the *Indiana Law Review* hoped to honor our beloved Professor Mitchell’s life in the most appropriate way we knew how: a tribute issue devoted to topics that deeply moved her. Executive Articles Editors Charles Daugherty and Mac Schilling, assisted by Senior Executive Editor Jennifer Ekblaw, sought out esteemed professors to write articles specifically for this issue. To that end, we are delighted to feature articles from Professors Theresa Beiner, Lynn Branham, Lauren Carasik, James Robertson, and Christopher Smith. Their impressive scholarship adds to the legal discourse in ways we are certain Professor Mitchell would have respected: Professor Beiner with a “snapshot of the state of women lawyers”; Professor Branham with five steps for transforming prison cultures; Professor Carasik with a critique of modern legal education; Professor Robertson with a proposed amendment to the Prison Rape Elimination Act; and Professor Smith with a discussion of recent Supreme Court changes that may impact prisoners’ rights. We also feature student notes discussing Indiana’s foster care system, the rights of sex offenders to access public libraries, and Indiana’s “three strikes” law for prisoner lawsuits—quite fittingly, authored by the last *Indiana Law Review* student for whom Professor Mitchell served as a mentor.

Professor Mitchell left an indelible mark outside the academy as well. To that end, we feature tribute pieces by three members of the Indiana University

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1. Henry B. Adams, QUOTATIONREFERENCE, <http://www.quotationreference.com/quotefinder.php?byax=1&strt=1&subj=Henry+B.+Adams> (last visited June 20, 2011).

faculty: Professors Susanah Mead, Florence Roisman, and Joan Ruhtenberg. The *Indiana Law Review* Executive Board would like to extend a special word of thanks to Professor Roisman, who graciously helped us off the ground during the brainstorming phase of this issue. She provided invaluable assistance in terms of topic selection and making the issue truly personal through the inclusion of Professor Mitchell's poetry. Consequently, we are honored to share a sampling of Professor Mitchell's creative work in this issue, and we also thank Professor Mitchell's family for their permission to publish these beautifully written pieces.

Saying goodbye is never easy, and an untimely goodbye is even more difficult to grasp. We offer our heartfelt condolences to Professor Mitchell's loved ones; we cannot imagine the pain of your loss. But we can promise one thing: Professor Mitchell inspired the class of 2011 to become worthy stewards of the law. We may not have known her well, but we all benefited from the great sense of community she inculcated at Inlow Hall. We may never have tasted her famous pies, but we were touched by the sweetness of her demeanor and words. Most of all, we all answered her call to something higher when we entered this profession. To the extent that our future remains unwritten, we can say one thing emphatically: we may never truly know where Professor Mitchell's influence ends.



## TRIBUTES

### A TRIBUTE TO PROFESSOR MARY MITCHELL

SUSANAH M. MEAD\*

In the nine years since we moved into this building, I have stood at this podium many times, usually to introduce distinguished speakers, welcome entering students, or greet groups assembled here for one reason or another. I am deeply honored to have been asked to speak from this podium today about my friend and colleague, Mary Mitchell, her many roles at the law school, and her remarkable contributions to our law school community. Nevertheless, the responsibility of doing justice to my subject and holding myself together while doing it have weighed heavily upon me for the last several months.

Mary Mitchell was a law professor. That is how many of us—her colleagues, her students, and others with whom she worked in this building—think of her. In some ways, it says a great deal about her that she chose as her profession to be a law professor and teacher. But really, it says very little about her because she was so many other things as well: mother, daughter, sister, wife, friend, student, caretaker, poet, reader, thinker, pacifist, activist, feminist, hostess of great parties, pie baker par excellence, and many more. Just as Mary would never ever categorize anyone, she herself defied categorization. I would love to talk about many of the things that Mary did, but my charge today is to talk about Mary and what she meant to the law school. This alone is no small task, and I have had to pare down my remarks far more than I would have liked. What I will focus on is Mary as colleague and faculty leader, Mary as teacher, and Mary as law school community builder.

I'll start with Mary as a colleague because that is how I first knew her and how I knew her best. I think a primary reason I was asked to give this talk, even though there are other colleagues who have been closer to her in recent years than I have, is that with the exception of her siblings, some older relatives, and old friends who may be here today, I have known Mary longer than anyone present—thirty years, give or take a few months. I started in the law school in 1978 as a lecturer in legal writing, and Mary started at the law school in a tenure-track position in 1980, having just finished two years as a lecturer in legal writing at the law school in Bloomington. I switched to the tenure track the next year, and for the next seventeen years, we were in offices next door to one another. Our offices had an interior adjoining door that was often open.

I can say in all honesty that with our meager credentials, there is not a law

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\* Professor of Law, Indiana University School of Law—Indianapolis. This tribute essay was originally a speech.

school in the country with any sense that would hire either one of us today. In 1981, Mary and I were truly as green as grass. In our adjoining offices, sitting not twenty feet from one another, we learned together how to be law professors. We certainly had the help of some wonderful, patient, and generous colleagues and mentors, but we largely learned through trial and error.

Initially, our great bond was that we suffered through the trials and tribulations of the promotion and tenure process together. The pre-tenure years are difficult and challenging for everyone, but Mary and I felt the uncertainty of them acutely. Not only did we not know what we were doing, but we also weren't sure what was expected of us. This was still an era when women were a relative rarity in law school as students, much less in the professorial ranks. When Mary started on the faculty in 1980, there were three female professors on the tenure track—none of them tenured or fully promoted—and two women lecturers who were ineligible for tenure. As a result, there were no women on the Promotion and Tenure Committee. We were both just beginning to see the challenges of juggling full-time jobs and families. I had three young children, and Mary had two babies during the promotion and tenure process. We had no idea what would be taken into account in our progress toward tenure.

During the promotion and tenure process, Mary and I helped and supported each other, but we approached it in very different ways. I was always doing things "by the book," never wanting (or maybe it would be more accurate to say never having the courage) to deviate from what I perceived people's expectations of me might be. While I wouldn't characterize Mary as an enormous risk taker, she certainly knew how and when to push the envelope. She never acted precipitously. She gave great thought always and in all matters to how the world should be—what would be right and just. As Tom Wilson, my colleague and Mary's close friend, said to me of Mary's approach to life, "The way you view the world determines how you act in the world."

In Mary's view of the world, personal needs, and especially family needs, should be accommodated. That's not to say that her job and the law school weren't important to her; they were very important to her. But in her view of the world, family and profession were parts of a whole that could and should coexist happily together. I first saw Mary put this world view into action when she became pregnant with her daughter Sally about halfway through the promotion and tenure process. Mary felt strongly that she wanted to stay home as much as she could to take care of her new baby. She wanted to teach part-time and not have to worry about the stresses of spending hours in the library researching her articles. It's hard to remember that this was a world before computers. There was really no such thing as "working from home" when working on an article. What Mary needed was to have some extra time before the tenure decision was made.

We talked about this at great length, and I certainly supported her one hundred percent. But I truly thought she didn't have a chance of changing the immutable rule of Indiana University that the tenure decision is made in the sixth year and effective in the seventh. I had not taken into account Mary's remarkable powers of persuasion, her advocacy skills, or her persistence. She went to the dean and ultimately convinced him of the rightness of her plan. She was



fortunate, of course, that the dean at the time was the humane and family-friendly Jerry Bepko, who supported her and agreed to talk to the powers in central administration who oversaw such matters. After much discussion and immense amounts of paperwork had been exchanged, the decision was made. Yes, Professor Mitchell could work part-time for a semester, but the part-time semester would not count toward tenure. Hence, she would not be able to count that year toward the tenure track, and her tenure decision would have to be postponed for a year. This, of course, was exactly the result Mary had hoped for.

Many years later, the university had a great debate about whether there should be a formal policy on “stopping the tenure clock.” It was discussed by faculty from all of the schools in the university, and the decision was that Indiana University would adopt a formal policy that under appropriate circumstances, the tenure clock could be stopped. So ultimately, Mary’s view of what was sensible and right received official university sanction.

When Sally was joined by Clara, and Mary and her husband decided to homeschool their daughters, Mary determined once again that she needed to work part-time. However, she hoped to maintain her health and retirement benefits and, most importantly, her tenure status. Once again, she was able to persuade the administration to see the need for and benefit of providing her the flexibility she needed. Today, these kinds of accommodations are so commonplace that we hardly take note of them, but in the early days of women with young families on the faculty, Mary had to dream up something that could work for her, her family, and the law school and then figure out a way to get it done. I think that in so many ways, Mary paved the way for the next generation of faculty at the law school, particularly women. I firmly believe and am very proud that our law school is uniquely family-friendly, and I am convinced that in large measure, we have Mary to thank for that.

As Mary and I became more senior, our paths diverged. I began what I initially intended to be a brief stint in administration that ended up lasting ten years. As I tried my hand at administration, Mary grew into her role as a leader of the faculty. She was the chair at one time or another of almost every law school committee and was regularly elected to the Faculty Executive Committee, the only committee elected by the faculty. She tended to be asked to chair committees in years when it was clear there would be contentious issues to address. I’m certain this is because every dean and associate dean responsible for appointing chairs realized that she was masterful at conducting meetings in a dignified and respectful way, even those likely to be rife with acrimony and potential for hurt feelings.

Mary’s leadership style, I’m sure, was in large part a product of her Quaker background. She introduced an issue and then listened to the varying points of view, giving everyone equal time to express him- or herself. She always looked for points on which everyone agreed and then worked toward finding consensus. She attempted to allow those present to discern for themselves their common ground and how to accommodate their differences. Often, as the leader and listener, she would hear the common ground that the participants had failed to recognize and would then express it to them in a way that made sense. Her patience in this process was really quite remarkable to behold.



George Wright, Mary's great friend and colleague, pointed out to me that the feminist, activist Mary might bristle at being characterized as "patient." And she was certainly not patient when she saw a wrong that could be made right or an injustice that could be cured. Nor was she shy about making her own position on issues clear. But her manner of asserting herself, no matter how strongly she felt about an issue, was never strident or confrontational. At faculty meetings during discussions which could become quite contentious, she almost never entered the fray early. She listened carefully to everyone. When she spoke, her comments were always thoughtful and well-reasoned and demonstrated respect for every point of view in the debate. They were also invariably powerful and persuasive. And there were generally common themes in her views of most issues: "what is fair; what is just; how can we accommodate the needs of the most people; how can we be the most inclusive?"

In her approach to what I can only think to call "faculty politics," she was always honest and forthright, never engaging in closed-door strategizing to influence an outcome, even if she felt passionately about the issue. She came to her decisions through reflection and deep thought, and although she often had discussions with individual colleagues, she used the public fora of faculty meetings, committee meetings, or emails to faculty listservs to express her views. Everyone always knew where Mary stood on the issues. I do not believe that there is a person working in this building who did not admire her and trust her implicitly, even though he or she might have disagreed with her positions.

As to Mary's teaching, there are those who are in a better position than I to talk about her in this capacity: her former students. Nevertheless, there are a few things I would like to say about her commitment to teaching. "Commitment" is really far too mild a word; Mary was passionate about her teaching. Although not every student had an opportunity to take a course from Mary, for at least the last twenty-five years, all students at this law school have had Mary as a teacher at the very beginning of their law school careers at first-year orientation. Many faculty members speak to the first-year students at orientation on a variety of topics. Student surveys of orientation we have given over the years indicate that even after a few months, students remember very little of what is said at orientation. The one exception to this is that virtually all students remember Mary's talk on how to maintain balance in law school. She spoke to the students about the importance of wholeness and maintaining perspective while in law school. When course work seemed overwhelming, she impressed upon them the importance of spending time with family and making time for something they loved, whether it be music, running, cooking, or knitting. We've had students who years—even decades—later talk about how important Mary's orientation talk was to them. Some even attribute their ability to get through law school and their success in life to hearing this talk.

Many of you know that Mary was the Alan H. Cohen Professor of Law, and I'm sure you know it is a very great honor indeed to hold a named professorship. What you may not know is that this particular professorship was dedicated specifically to supporting a faculty member "who made a significant contribution in the area of teaching and who had a strong and sustained reputation in this area of responsibility." Although the decision on professorships is made by a campus-

wide “titled professorships committee,” the donor specifically supported Mary Mitchell for this professorship, and the committee agreed.

Mary’s course offerings over the years reflected her many interests. She loved teaching first-year students. She wanted to instill in them from the outset what she most valued about the law. She said about her teaching in a grant application years ago, “My primary aims in teaching are to ingrain in students a habit of rigorous reasoning to impel them continually to uncover issues and scrutinize beliefs, to open legal issues to interdisciplinary perspectives, and to keep legal issues always in the stream of moral and ethical discourse.” She started this process with her first-year contracts students. Her upper-level course offerings typically demonstrated her passion for justice for all and frequently focused on the easily abused, the underserved, and the often forgotten. In addition to her law school teaching, she taught two three-hour undergraduate courses at the Indianapolis Peace Institute.

Mary loved to teach. She loved teaching all her classes, but I believe the teaching she loved the most, with the possible exception of teaching her own children, was teaching the ICLEO students. For those of you not familiar with it, ICLEO is the Indiana Conference for Legal Education Opportunity.<sup>1</sup> This program was developed over ten years ago, through the efforts of Chief Justice Randall Shepard of the Indiana Supreme Court and the Indiana legislature, to provide minority, low-income, and educationally disadvantaged college graduates with assistance in pursuing law degrees and careers in the Indiana legal community. The ICLEO program is no small commitment for students or faculty. ICLEO is essentially a “boot camp” for pre-law students. It is a six-week residential summer program at one of the four law schools in the state that provides intensive instruction in three substantive areas of law and legal writing and analysis. The thirty or so students who participate receive extensive preparation for legal studies as well as tips for success in law school. They also develop a group of lifelong friends and close relationships with the professors teaching in the program. After the program, virtually all of the ICLEO graduates enroll in one of the four Indiana law schools. Our law school has been fortunate in most years to get the lion’s share of these students.

We also have been fortunate to have had the ICLEO program at our school four times since its inception, and Mary taught the segment of contract law each time. She loved teaching this course, and she loved the students who took it. And they loved her. She taught her students a great deal about the law of contracts, but more important by far, she instilled in them her conviction that each one of them could and would succeed in law school and in his or her career as a lawyer. As a testament to her, the members of her last ICLEO class came to her funeral en masse wearing their ICLEO shirts.

Any discussion of Mary’s teaching would be incomplete without mention of her work with students outside the classroom. Students streamed to her office at all hours of the day and night. She was welcoming and accessible to all to

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1. See *About CLEO*, IND. CONFERENCE FOR LEGAL EDUC. OPPORTUNITY, <http://www.in.gov/judiciary/cleo/about.html> (last modified Mar. 18, 2010).



discuss their course work, their personal problems, or anything that was on their minds. The word “mentor” is so overused these days that I almost hate to use it to describe her, but I looked it up in the dictionary, and the definition was perfect: “a wise and trusted counselor or teacher.” That she certainly was! She was an astute listener, friend, and adviser to hundreds—probably thousands—of students who sought her counsel and compassionate ear outside the classroom over her three decades of teaching. And with Mary, it was never a question of just listening to this one and then going on to the next one. You couldn’t go to Mary for a good cry and then expect her to forget you. When she had concerns or had made suggestions, she made a point to follow up to see how things were going. There are many who claim they would never have made it through law school without her unflagging support and encouragement, as well as others who saw with her guidance that law school and the study of law was not right for them and now attribute their happiness in their chosen pursuits to her wise counsel.

In January, our colleague Joel Schumm nominated Mary on behalf of the law school for the Alvin S. Bynum Mentor Award, a campus-wide award given to a faculty member who has made truly extraordinary contributions and cumulative impact on the lives of students. The emphasis in selection of award recipients is out-of-class mentoring activities. I wish I had time to read all the letters in support of Mary’s nomination. I’ve picked just a couple of short excerpts. One former student wrote, “Had it not been for Professor Mitchell’s mentoring and tutelage, I have no doubt that I would not be the lawyer and person that I am today. Reading back over this letter, I still find my words inadequate in describing what a monument Professor Mitchell was in my life.” Another student wrote, “I found her to be unquestionably knowledgeable, patient, encouraging, and fully accepting of me—she was the first educator I ever met who believed in me without reservation.” At the campus honors convocation last month, the Alvin S. Bynum Mentor Award was presented posthumously to Professor Mary Mitchell. Professor Schumm stated in his letter of nomination,

We wish we had nominated Mary earlier for this award. She was certainly no less deserving last year or the year before than she is now. This is a sad reminder to us all of how important it is to love, admire and care for one another in the here and now, a lesson we could and should have learned from Mary, who never ceased teaching it.

My final topic is Mary as a community builder in the law school. I cannot overstate the importance of community in Mary’s life—every kind of community. I think that to her, all communities were an extension of family. She had an absolute horror of exclusivity or a sense that some might feel excluded or marginalized. Because her special focus was on family, she wanted all who were connected with the law school to consider themselves and be considered by others as an integral part of the law school family—faculty regardless of rank or status, librarians, students, administrative staff, administrative and faculty support staff, and maintenance staff. To Mary, all should be equally important and appreciated.

When we moved into this building in 2001, most of us felt enormous relief to be out of our cramped, somewhat tired and dingy surroundings across the street. We saw Inlow Hall as a dream come true, a beautiful building that filled



all our needs for student space, clinic space, classroom space, library space, and more. Mary, on the other hand, saw a giant limestone and glass box with walls and partitions that divided rather than united us. Instead of faculty walking from the parking lot through the crowded student lounge as we did in the old building, faculty now rode an elevator from a garage exclusively for the use of faculty and staff up to faculty office spaces separated from the rest of the building by large, closed doors. It was and is possible for a faculty member to get from car to office without ever seeing a student. Mary hated this and always made it a point to enter the building at ground level, to walk through areas where she saw students congregated, and to stop and talk to them. She also involved herself as much as she could in a variety of student activities. She advised several student groups, regularly participated in the law school talent show, and always baked pies for the Women's Caucus charity auction. She attended Minority Law Day and Admitted Students Day. In short, she wanted to be a part of any activity that connected us.

The year after we moved into the new building, the law school went through the excruciating experience all ABA-accredited law schools experience every seven years: the ABA reinspection process. As a part of this process, each law school writes a self-study, which is a lengthy document in which the law school talks about its strengths, weaknesses, and aspirations. All self-studies begin with the law school's mission statement. Virtually every law school has a three-part mission statement focusing on three areas: faculty teaching, scholarship, and service. Mary and I were both involved in the 2002 self-study—she as a faculty member on the Self-Study Committee, I as associate dean. Mary was adamant that our mission statement include a fourth component focused on community. I, traditionalist that I am, was in favor of sticking with the usual approach. But Mary's powers of persuasion were great, and she carried the day. The mission statement included a fourth component which states that the school will "promote[] a diverse, humane, and supportive community of persons."<sup>2</sup> For Mary, the beauty of this statement was that it included everyone in the building and everything he or she might be doing here, whether writing a book, teaching or taking a class, organizing meetings, or mopping floors.

This community building and insistence on inclusion demonstrates clearly that to Mary, everyone mattered. She had a gift for making all those with whom she came in contact know that they mattered and would never be overlooked by her. I could give dozens of examples of this, but I'll limit myself to one that relates directly to the law school community. Several years ago, she became concerned about her perception that to most of us, members of our building maintenance staff were overlooked and underappreciated. Yes, we all contributed money each holiday season to a gift for them, but to Mary, this was woefully inadequate recognition. She convinced the dean that we should have an annual luncheon devoted solely to honoring them. At the luncheon, each member of the maintenance staff is introduced individually by a member of the faculty, and information is given about his or her family and interests. This function was

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2. IND. UNIV. SCH. OF LAW—INDIANAPOLIS, STRATEGIC PLAN 1 (2010), *available at* <http://indylaw.indiana.edu/news/strategicplan.pdf>.

incredibly important to Mary because to her, no community worth being involved in should have people who are invisible to anyone.

As I'm sure you can tell, I could go on and on, but I promise you I won't. But all I have said so far has been so serious, and I can't bear to end without saying just a little something about Mary's sense of fun. Who can forget Mary on Halloween appearing in one of her many marvelous costumes? My personal favorite was the clown costume, although her witch costume was also pretty terrific. And I daresay her first-year contracts students will never forget her appearance in class wearing the "the hairy hand" on the day they discussed *Hawkins v. McGee*,<sup>3</sup> giving the concept of "the benefit of the bargain" indelible meaning.

Yes, Mary was a law professor, but she was so much more to everyone who knew her—in this place and everywhere she went. She was not a person with a litany of causes; rather, she was a person who recognized injustice when she saw it and did everything in her power to eradicate it. She was the one with the candle in front of the governor's mansion at midnight in thirty-degree weather the night of an execution. But she was never self-righteous or judgmental if those who might share her abhorrence of capital punishment chose not to join her in her chilly vigil.

As Vice Dean Paul Cox said to me when I asked him how he would characterize Mary and her role on the faculty, "she humanized us; she softened our sharp edges." Mary certainly did that, and without her, we must be vigilant to assure that our edges do not become so sharp that we are in danger of injuring one another.

That we had Mary in our midst for so long was a great blessing; that we lost her too soon is a great tragedy—one from which this law school community will not soon recover. But I have great confidence that there are many of us here and elsewhere in the world who will work to keep her memory and her legacy alive.

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3. 146 A. 641 (N.H. 1929).



# MARY HARTER MITCHELL

FLORENCE WAGMAN ROISMAN\*

Like every other human being, Mary Harter Mitchell had many different facets, interests, and relationships with a wide variety of people. I knew her as a law school colleague for twelve years—from 1997, when I came to Indiana, to 2009, when she died. Although I considered her a cherished and revered friend as well as colleague, we rarely saw each other socially; almost all that I knew of her was through her presence and work at the law school.

Although we are taught that no person is indispensable, my experience with Professor Mitchell makes me question that proposition. She occupied a unique position at the law school. She was recognized as a person of total integrity, broad and deep compassion, and thorough kindness as well as keen intellectual prowess, breadth of knowledge and interest, and loyalty to the school. These all are stellar qualities, but they are not qualities peculiar to Professor Mitchell. What especially distinguished her, I think, was that she possessed all these characteristics along with a wide, deep, passionate abhorrence of any form of inequity, injustice, unfairness, unkindness, or oppression and a determination to eliminate all instances of such evils. She cared about and acted on behalf of individuals, and she challenged systemic institutional oppression as well.

Professor Mitchell was a Quaker, and she demonstrated in her life the Quaker admonition to find the spark of divinity in every human being.<sup>1</sup> No one was excluded from her concern or denied her respect. But those who oppressed others, while benefitting from her compassion and understanding, also had to face her steely insistence that they speak and act justly.

Teaching was a central part of Professor Mitchell's life, and social justice concerns were at the heart of her teaching. For many years, she taught her own beloved daughters, Clara and Sally, at home. She taught at the Indianapolis Peace Institute (courses on "Practical Peace-Making" and "Peace and the Arts"). She taught contracts in the Indiana Conference for Legal Education Opportunities Summer Institute in 1999, 2003, and 2005. She quietly and effectively devoted a huge amount of time to giving special attention and nurturing to students who showed great promise but bore the marks of inadequate academic preparation.

At the law school, in addition to teaching contracts, church and state, and family law, she created and taught courses that immersed students in significant social justice issues: law and the elderly; law and education; law and literature (focusing on prison literature); law and rape; and the law of corrections and prisoners' rights (initially with a co-teacher). When the law school had no one to teach a course in women and the law, Professor Mitchell organized a group of faculty to offer it, taking upon herself the substantial work of coordination and administration. In 2009, Professor Mitchell was planning two new seminars:

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\* William F. Harvey Professor of Law, Indiana University School of Law—Indianapolis. I am grateful to Ms. Kyle Galster and Professor Susanah Mead for improvements to this Essay.

1. PAUL D. BUCHANAN, *THE AMERICAN WOMEN'S RIGHTS MOVEMENT: A CHRONOLOGY OF EVENTS AND OPPORTUNITIES FROM 1600 TO 2008*, at 16 (2009) (describing the Society of Friends).



“Rationales for Criminal Punishment” (considering the jurisprudence of retribution, deterrence, rehabilitation, and restorative justice) and a course on pardon and forgiveness.<sup>2</sup> Of the elective courses she taught, Professor Mitchell wrote: “I am proud to serve at these outposts in the academy, where socially and morally crucial issues are examined.”<sup>3</sup> These were issues on which Mary Harter Mitchell worked in many different aspects of her life: opposing war and violence in every form, notably including the death penalty; and protecting the rights of such oppressed groups as women, prisoners, elderly people, and religious and other minorities. It is thus especially appropriate that this issue of the *Indiana Law Review*, organized to honor her memory, focuses on the issues that most engaged her attention and concern.

Professor Mitchell was a dedicated student as well as teacher. She graduated summa cum laude, first in her class, from Butler University, and then was an editor of the *Cornell Law Review* and a member of the Order of the Coif at Cornell Law School. She took non-degree graduate courses at the Christian Theological Seminary in Indianapolis for decades. And she actively practiced what she identified as her “avocation” as a poet, including publishing in the *Journal of Legal Education* a quite lovely poem about the first-year contracts course.<sup>4</sup>

The law school’s respect for Professor Mitchell was evidenced in a variety of ways. The faculty has one elected committee, the Executive Committee (EC), and Professor Mitchell often would be the first person chosen for it. Selecting all five members might take many ballots, but the faculty usually was virtually unanimous about her. One of the EC’s responsibilities is to select recipients of the Indiana University Trustees Teaching Awards. Ordinarily, members of the EC are not considered for these awards because the EC chooses the recipients, but in 2003, her colleagues on the committee decided to disregard that usual rule of ineligibility to select her for a Trustees Teaching Award. Her colleagues’ reasoning was that because Professor Mitchell was so often a member of the EC, she might never be given this teaching honor which she unquestionably deserved.

Professor Mitchell also served on and chaired committees that required particular sensitivity. She chaired the curriculum committee, the honor code special committee, the student affairs committee from 2002 to 2004, and the teaching committee from 2004-07. From 2008 until her death, she chaired the promotion and tenure committee, and she memorably presided over a difficult discussion that raised divisive substantive issues. I believe that everyone on the committee must have been profoundly impressed by the patient, respectful, insightful way in which Professor Mitchell led us through tension and arguments to a position of genuine consensus. She was faculty advisor to several student

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2. PROF. MARY HARTER MITCHELL, IND. UNIV. SCH. OF LAW—INDIANAPOLIS, FACULTY ANNUAL SURVEY: PT. IV (2009) (on file with the Office of the Dean, Ind. Univ. Sch. of Law—Indianapolis).

3. *Id.*

4. Mary Harter Mitchell, *April, Contracts Class, First Year of Law School*, 52 J. LEGAL EDUC. 312 (2002).

groups: Law Students Against Capital Punishment; the Women's Caucus; Lambda Law Society; the Association for Public Interest Law; and the Society on Law and Conscience. She organized and spoke at events related to the death penalty, women's rights, spirituality, and prisoners' rights. She was a regular—and regularly unforgettable—speaker at the orientation for first-year students, when she urged students to maintain their integrity and keep their lives balanced between their studies and their human relationships. She created a “Law and Justice” film series, the Sister Heart Project for assisting women in prison, and the law school's annual reception honoring members of the building services staff. Posthumously, Professor Mitchell was given the 2010 IUPUI Inspirational Woman Award and IUPUI's Bynum Mentor Award.

During the years that we shared on the faculty, the law school faced several painful, challenging, divisive issues. I recall in particular two: one involved a gift to the school that some of us thought should not have been accepted; the other involved concern about the conduct of a junior member of the faculty that led to claims by him that she and I had, for inappropriate reasons, prevented him from securing tenure. In each situation, Professor Mitchell and I were on the same “side,” but in each case she wrote her own statements and expressed her views separately. With respect to the gift, for example, several of us collaborated on letters urging rejection of the gift; Professor Mitchell agreed that the gift should be rejected, but she wrote her own letter. While I never discussed with her the reasons for her separate statements, I believe that she sought a softer, more compassionate tone than others of us achieved. Of course, part of the explanation also may have been her keen sensitivity to language and her poet's search for precisely the right words and phrases—an eloquence the rest of us did not achieve.

There probably never is a “right” time for anyone to die, but it seems particularly unfair that Professor Mitchell died when she did. Much of her life had been spent taking care of other people—her children, and then her ailing mother, who died in 2007. These responsibilities over, she was entering into a period of great joy and fulfillment in her life. Personally, she was gloriously happy. Professionally, she had done a great deal of research for an article about the concept of human dignity—“its sources, content, coherence”—and its implications for prisoners: “do or should criminals forfeit that dignity so as to lose a dignity argument for better treatment in prison?”<sup>5</sup> We all are the losers for not having the benefit of her writing on this and other topics.

It is difficult to write about Professor Mitchell without sinking into clichés. She was luminous, gentle, and strong. Rarely does a day pass without my wanting to tell her about something I've read or heard—sometimes an outrage against human dignity, sometimes an act of great courage that she would appreciate. I keep her in my mind at all times and try to live up to the high standard she set. I hope that all whom she influenced will do the same.

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5. MITCHELL, *supra* note 2, at Pt. I.A.4.





# REFLECTIONS ON THE LIFE OF MARY MITCHELL

JOAN M. RUHTENBERG\*

“[V]ariety . . . is the greatest social good life can offer.”<sup>1</sup> This quotation is from a book that was in Professor Mary Mitchell’s library; she had underlined it and marked it with an asterisk. I wonder if she realized that it is a perfect summary of her life. So many things inspired her—nature, poetry, philosophy, religion, history, justice, teaching, mentoring—and she lived an unselfish, varied, and admirable life based on her interest and devotion to them.

Mary was a deeply religious person and was active in the First Friends Meeting, a Quaker church in Indianapolis. She was also interested in the philosophical underpinnings of justice and morals. I did not know, however, the extent of her interest in philosophy until after her death, when her family graciously invited her friends and colleagues to take books from her library. I took them up on their kind offer and discovered that Mary had books on philosophy, religion, political theory, and related topics<sup>2</sup> that were heavily underlined and annotated. This collection provided wonderful insight into Mary’s view of life. Her intense interest in these and other topics undoubtedly influenced her lifelong devotion to service, teaching, and creativity.

## *Community Service*

Mary’s services to the community were many and varied, but one of her main interests was the rights and needs of the elderly. Her first publication after she joined the law school faculty was a handbook titled *Legal Reference for Older Hoosiers*,<sup>3</sup> which the Indiana State Bar Association has distributed to thousands of elderly Indiana residents. She also served on the Indiana State Bar Association’s special committee on legal aid to older adults; the university’s committee on the aged, which started a gerontology program at IUPUI; and the board of directors of Heritage Place (a senior center) and Mulberry Lutheran

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1. NANCY L. ROSENBLUM, ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT 17 (1987) (describing Wilhelm von Humboldt’s view of liberalism).

2. Examples include GORDON H. CLARK, LANGUAGE AND THEOLOGY (1980) (the importance of language in religious and secular theories); POETRY AND POLITICS: AN ANTHOLOGY OF ESSAYS (Richard Jones ed., 1985) (the influence of the poet, if any, on politics); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM (1993) (the influence of liberalism, the Enlightenment, and Christianity on the drafters of the U.S. Constitution); ROSENBLUM, *supra* note 1 (a comparison of the liberalism of Romantics such as William Wordsworth with modern liberalism); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (a critique of modern liberalism in the tradition of Immanuel Kant); JOSEPH TUSSMAN, GOVERNMENT AND THE MIND (1977) (the role of government in influencing the minds of its citizens).

3. MARY HARTE MITCHELL, IND. BAR FOUND., LEGAL REFERENCE FOR OLDER HOOSIERS (1982).

Home (a nursing home). This interest inspired her to create and teach a new course: Law and the Elderly.

Many of us who seek to help those in need focus on the poor, the homeless, the disabled, and so forth, but we never think of prisoners. That was not the case with Mary. She devoted considerable time and energy to various projects involving legal and other aid to prisoners and their families. Those at the law school are familiar with Sister Heart, an annual project that Mary started. She collected donations of toiletries and other items and delivered them to women who were in prison. She also participated in Citizens United for Rehabilitation of Errants (CURE), an organization for prisoners and their families; volunteered at Craine House, an alternative sentencing facility for female offenders and their families; and worked with various Quaker organizations related to prison ministry. As a result of her concern for prisoners, she created and taught, along with Donald Mohr, a new course: The Law of Corrections and Prisoners' Rights.

### *Service to the Law School*

Mary's creativity, devotion to legal education, and her kind and generous spirit were a great asset to the law school community. In addition to teaching contracts, she created several new courses on a range of topics, including, in addition to those mentioned above, law and education, women and law, and law and literature. She served as chair of almost every faculty committee during her tenure and was awarded the Faculty Leadership Award in May 2009. Most notable was her ability to guide discussions, even contentious ones, in faculty and committee meetings with tact and integrity. She encouraged full discussion of the issues we faced so that we would make educated, reasoned decisions. She was like the angel on our collective shoulder, asking, "Are you sure?" And when she disagreed with a colleague's position, she did so respectfully and with grace—always with grace.

### *Teaching and Mentoring*

At her memorial service, many former students spoke of the inspiration that Professor Mitchell had been to them as a teacher, a mentor, and a friend. To give one example out of many, a former student explained Mary's influence on his life. He met Mary after he had been released from prison and was homeless. She invited him to attend her course on prisoners' rights and later to apply for admission to the law school. He did so, and because of Mary's encouragement and mentoring, he is now a lawyer working in the Indiana State Public Defender's Office, and he is writing a book on his journey from homelessness to the practice of law. Later, in a letter recommending Mary for the university's Alvin S. Bynum Mentor Award for Excellence in Academic Mentoring by a Faculty Member, which she was awarded posthumously, one of her former students described her as a "truly amazing and inspiring professor" who spent hours throughout law school talking to her about "life, school, hopes, and dreams."<sup>4</sup>

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4. Letter from Dean Gary Roberts and Professor Joel Schumm, Indiana University School



At the law school orientation each year, Mary spoke to incoming students about the importance of wholeness in their lives and about keeping their perspective during law school. She advised them not to neglect family, friends, and things they enjoyed, such as art, music, and nature, during their challenging years in law school. Students may remember little about orientation, but they usually remember Mary's advice, and many have explained how it helped them to keep going when they became discouraged.

Mary and I taught in the Indiana Conference for Legal Education Opportunities (ICLEO) program each summer that it was hosted by our law school, including the summer of 2009. Many students have spoken about how Mary's teaching method enabled them to learn, to question, and to gain confidence in how to think about the law. After hearing of her death, a former ICLEO student wrote this e-mail message:

This past summer, along with . . . 28 bright men and women, I was introduced to [c]ontract [l]aw. . . . [T]hanks to the dexterity, ingenuity and candor of our professors, we all left the program with a ton of knowledge and feeling fortunate. . . . Today, one of these irreplaceable professors abruptly left us; she left us thirsty for more, and eager to show her we had mastered, made good use of what she taught us. Professor Mary Mitchell, we will miss you and you will forever live in our hearts, mind and contracts classes, and finals. Rest in [p]eace.<sup>5</sup>

Another student responded:

I would like to say that she inspired all of us to never give answers, but to question legal doctrines. Further, she had the ability to take such complex situations and break them down for us. [S]he shared with us her last summer, which I will always be grateful for. She chose to give back, and now, we are the beneficiaries of that grace. God bless and rest in peace[,] Professor Mitchell.<sup>6</sup>

### *Nature and Poetry*

Mary loved the physical world and found a spirituality in it, as her poetry reflects. I was Mary's next-door neighbor for years, and I recall seeing her many times grading papers in her backyard rather than in some enclosed office. I also recall the last time I heard Mary speak. Shortly before her death, she had moved into her new husband's house. I visited Mary there several days before she was

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of Law—Indianapolis, to the Bynum Mentor Award Selection Committee, Indiana University Purdue University Indianapolis (Jan. 15, 2010) (quoting Angie Grogan) (on file with author).

5. E-mail from Arsene Millogo, student at Indiana University School of Law—Indianapolis, to Chasity Thompson and former ICLEO students and faculty (Nov. 4, 2009) (on file with author).

6. E-mail from Steven Zamora, student at Indiana University School of Law—Indianapolis, to Chasity Thompson and former ICLEO students and faculty (Nov. 6, 2009) (on file with author).



transferred to the hospital. Her daughter Sally escorted me upstairs to where Mary was propped up in a lounge chair in a sunlit room. She was so weak that she could hardly speak, but she managed to tell me two things. One was that this room, with its large windows and beautiful view of the out-of-doors, would be her home office. The other was her request to Sally as I was leaving: "Sally, show Joan the backyard." Sally did so, and I saw a miniature nature preserve bordered by a creek—the perfect setting for Mary Mitchell.

Mary's poems reflected not only her love of the natural world but also her view of nature's cycle of life and death. On the occasion of my husband's funeral, she wrote this poem:

On a summer solstice afternoon  
and too soon  
we buried the mourned man's ashes under an oak,

And there in the day's bright linger  
we spoke  
of the good,

of husband, father, brother,  
of pains drowned,  
of love, of the sun's arounding  
the years like gold around a finger  
or the secret rings of the wood.  
By this day's light the difference we see

between life's crooked circles, each one other,  
and love's round return.  
Gold will not burn

but there are ashes close by the roots  
of every green tree.

At her commemoration service, her family and friends scattered Mary's ashes under a tree planted in her honor at the First Friends Meeting—a perfect closure to the wonderful life of Mary Harter Mitchell.

# Indiana Law Review

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Volume 44

2011

Number 3

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## THE POETRY OF MARY HARTER MITCHELL

### Nothing to Do with Dionysus

Rather than go to my dying mother's bed,  
I write an inconstant poem for her.  
What reason? What is it I am?  
If you drink from the sun,  
if your tongue scalds,  
the pain must form on something,

the form of which saves you.  
Because in ancient Greece  
the actors left the stage to switch  
their masks and voices, a chanting  
chorus covered the changes, they say.  
I say the art of the sons and daughters  
is all that holds us,

crossing, re-crossing,  
treading out tragedy.  
One dance across the stage  
becomes one line of a poem,  
the verse where the dancers  
turn. Millennia pass.  
A sadness without myth  
climbs into the lines  
as into a lap.

Between the stanzas  
the mothers are inconsolable.  
If the words do not turn and call  
us back the poems break out  
and dance up the mountains,  
their feet moving under the snow.

### Irrational

It was a pretty little pie  
I gave my mother:  
    fluted crust,  
    red cherries  
    in sugar.  
O, she did love sweets!  
O, we loved her, all her children!  
When we gathered 'round her bed—  
    nice family!—  
    and she died,  
in a twinkling changed and left us,  
I was thinking  
of the pie she never ate,  
how it pertly sat unwrapped,  
how it now was changed forever,  
    little circle,  
    sweet pretty little pie.

### Shell Game

If it is true that at death's  
    instant some aura escapes  
    from the body and is visible,  
  
briefly, then is gone,  
    I will never be quick enough  
    to love that soul before it leaves  
  
this world. I will be lingering  
    on the lips, not for words  
    but for cushion, the hands' stars,  
  
crumpling, the ears for their maze  
    of sticky valleys and not for any  
    admittance, the feet's crusty bones,  
  
the chest for its still precious heft  
    and hollows, after the looping air  
    has raveled away, even the skin  
  
folded thinly over the eyes  
    I will kiss. I plan already  
    to hold for as long as I can



to the still shape, the literal unhinged  
from eternity; and though thereby  
I may miss some pure

essence lifting like morning fog,  
like the top of a metaphor carried off,  
what else can we love, being human,

but this hull, this bass note, this  
altar of stones? It is more to us  
than any bright everything up into which

a soul can pour. At fairs I never could  
follow the pea hustled  
under the three scuffling shells;

I was always amazed;  
I was always tricked.  
That's what made the game pay.

When the jig is up we might as well  
be changed into something vaguely  
shining. Yet when the fingertips' whorls—

why in heaven's name so singularly  
wrought?—stiffen and drain,  
what earthly consolation can we find

in new whorls brightly spinning  
on the sun's old face?  
Mary at the tomb

would have stroked the hands'  
stars; she would have spat out  
holy wafers onto the ground.

### Profile

They tend to not be loners.  
Their neighbors usually know  
who they are.  
They tend to not  
traffic in weakness.  
They probably never were  
very hungry  
for food.

They know about weapons and politics.  
They almost always think  
in packs.  
They like to be known as  
someone  
not to be f . . . ed with.

They are usually  
religious: when provoked  
they like to take a deity  
off its shelf  
and set it on the table  
to be handled.  
They tend to not hear voices.

They are usually  
conventional; they often talk and dress  
very well.

It will do no good  
to report them to authorities.  
They probably are  
the authorities

and even if not  
you would turn them in and come back later  
to find them sharing coffee and jokes  
with the other powers  
and everyone wearing  
nice shoes.

You should know  
they are  
extremely  
dangerous.

### Retribution

Fisted, go from the execution,  
the missile crater, the body count—  
uncrumple your hand, it is  
still empty,  
and the red hole in the muscle of your heart  
is still a red hole  
in the muscle of your heart.

### Clearness

In the meeting-room plain as a close-eyed face,  
pure of symbols, undistracted,  
we worship in pews squared to simple walls  
and windows of almost invisible glass.

But this morning someone has set in our view  
a glass globe crowded with zinnias and cosmos.  
We sit and consider the flowers.  
Their stems arch crazily over each other  
and over their juttied leaves.  
They are red and orange and pink.  
The sun tips into the room and through  
their wheels of petals.  
Under the water the sturdy stems  
are covered with tiny bubbles.  
Over the water the colors tremble with seed.

The flowers are just the flowers.  
We sit and see where the cut green life of them  
pierces the tender membrane between worlds,  
the level skin where air sits on water.  
One could live like this.

### Palm Sunday

Hosanna!  
It's a rollicking damn-good time.  
We cheer, we  
shout along the streets, we  
wave the life lines, love lines, laugh lines  
of our unbroken palms.  
O God,  
we are guilty  
of such innocent, innocent times.

### Burning Bush

This is the one miracle  
you must believe:  
past the pain that shuts the mouth  
is another pain that opens  
the mouth, the burning alive becomes  
both a screaming in



and a sign.

Some say it was yellow leaves  
or the low sun.  
From my blackened tuft of sticks I open  
my mouth, I say  
no, no! the leaves were green as young mint and it  
was fire.

### Creation

I hold with those who say the world begins  
in fire on ice, a day like today, in a word  
exhaled warmly onto a mirror  
of polished silver awareness—  
our work to be weaving with all we sense, hemming  
with all we love, fine fabric  
to drench in the wet breath  
of the open Mouth.

Fish ribs bleach and dissolve  
in a lake of sky, sun dazzles over  
the rolling brightness of snow,  
a blue is sunken  
like ink into the downs both shallow and deep,  
and from cold pasture  
trees muscle up raw iron,  
gray, thinly gilt, and weeds are caught  
like brown needles in the softest  
white cloth.

### November

a wide gray lowers  
over what is left  
in the cold  
whole fields of hollow  
stems rattling  
in ragged rushes and leaves

their many browns broken  
even to dull red  
and yellow  
broken in waves  
across whole shaken fields

poor scavenge

a wind ahead of the snow  
drives into our faces  
the children start coming home from school  
in the dark

something old in us  
wants to store hard things  
in close places—cellars, shelves  
pour dry seeds shooshing into sacks  
heap shells and sheaves in rooms, near  
but out of the wind

for a heaviness pulls at us now  
we swallow cider the color of bloody gold  
sweet, sweet as cold apple blossoms  
we wait    we live  
hard by the counter-weight of the store  
we live    hard by

### Poet

I pressed Clara's flowers  
in the unabridged dictionary  
years ago  
in the pink and yellow times  
and have just again found them  
in the press of words.

She danced on a luminous stage  
in pale pink slippers,  
youngishly tossing our hearts,  
and afterwards her grandparents gave her  
yellow carnations,  
which she has forgotten.

This is what I do:  
I close and open the book.  
It is a slow career,  
but I do it: I press and then look  
to see  
what holds.

**April, Contracts Class,  
First Year of Law School<sup>1</sup>**

In law school you are learning what to sight  
and it should move you.  
In other life, sighting a robin  
is something you can do, but  
in law school, it seems, you have to cite  
what someone who is not you has seen.  
In other life, you can taste and smell what nourishes.  
*See April. See also love.*  
*But cf.* you decide this spring  
how many classroom windows to leave open.

In other life promises, covenants,  
can be deeply part of who we are;  
but here we make a brief-long study  
of broken promises by people—  
we don't know who they are,  
Party A, Party B, appellations—  
about widgets—we don't know *what* they are.  
*See Corbin, Williston, Murray.*  
*See also Moses, Mohammed, Mao.* It is time,  
past time, to wonder

what I am doing here, because I have  
tenure, and it scares me to be so secure  
(and doesn't that sound just precious  
to a worker newly fired from the factory  
moving where it's cheaper), and also because  
criticism is cheap behind these sturdy walls;  
*see, e.g., feminism, Marxism,*  
critical legal studies, critical race theory,  
and the voices that haven't yet made it even  
into the footnotes.

*But see, e.g.,* should a feminist  
prefer, to that label, an autobiography?  
Should she talk about her children? Should she ever  
profess an interest in family law?  
Should she smile and speak softly  
and nurture across her desk with its vase of flowers?  
Shouldn't she rather kick ass,

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1. Originally published in 52 J. LEGAL EDUC. 312, 312-13 (2002). The *Indiana Law Review* thanks the *Journal of Legal Education* for granting permission to reprint this poem.



get off on the Uniform Commercial Code,  
and computerize her outline of the role of contract law  
in Western civilization

(roman numeral two sub A, sub seven, where does family go?  
where does love meet work in the linear outline? sub children  
hyperlink)? I do not profess to understand  
all the abbreviations: *e.g.*, someone I love is dead  
and every birthday I have now  
is a going away.

*See also* children growing up;  
country long gone to war;  
and hatred, finely tailored as a lawyer,  
going to political conventions.

*See also* too many students want it all  
in declarative sentences,  
of one piece, whole, with handles,  
as if that would be truer.  
*Cf.* what we, wrung out, would settle for now  
as good enough law.  
Finding myself here—"professor"—  
what to profess?  
to build a career, or a life, on the urge  
that only some people have

to drop their eyes to the footnotes?  
to make a community among those journeying  
between the text and the questions:  
    by what and whose authority?  
    and what else is there to say?  
and even then to dispute the whole like a mystic  
(not everything is in sight)?  
finally to profess  
in all the voices that I have:  
yes, this is what we are doing? For now.

*But see:*



## ARTICLES

### SOME THOUGHTS ON THE STATE OF WOMEN LAWYERS AND WHY TITLE VII HAS NOT WORKED FOR THEM

THERESA M. BEINER\*

#### INTRODUCTION

I graduated from law school in 1989—over twenty years ago. At the time I graduated, my law school class was close to 50% female, which was a fairly common phenomenon at the time across the country.<sup>1</sup> Today, first-year law school classes also generally consist of roughly half female and half male students.<sup>2</sup> When I graduated, I thought that with such numbers, the women who were my classmates would do extraordinarily well practicing law. We would rise in the ranks through the large national law firms. The law firms with which I interviewed touted their family-friendly policies and atmospheres. Certainly, the future for women lawyers was very bright. So, I sit here over twenty years later and am dismayed to hear that women have not been successful. They have struggled in large firms, dropping out at alarming rates.<sup>3</sup> Certainly, the sheer numbers of women graduating from law schools and the existence of anti-discrimination civil rights laws, such as Title VII of the Civil Rights Act of 1964,<sup>4</sup> should have made a difference by now.

This essay discusses why women lawyers have not been as successful in large firms. It begins by giving a snapshot of the state of women lawyers, including

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\* Nadine Baum Distinguished Professor of Law and Associate Dean for Faculty Development, UALR William H. Bowen School of Law. This article is the result of a presentation made at the Southeastern Association of Law Schools during the summer of 2009. I would like to thank those who provided feedback during that session. Thanks go to Amber Davis-Tanner for her research assistance. This Article was supported by a research grant from the UALR Bowen School of Law.

1. In the 1988-89 school year, 42.9% of first year enrollees were female, and 42.2% of enrollees overall were female. AM. BAR ASS'N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2008, at 1 (2010), available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf>. The enrollment of women overall hit a high of 50.4% in the 1992-93 school year. *Id.* It has hovered close to 50%, i.e., 45% or higher, since the 1997-98 school year. *Id.*

2. For the 2009-10 school year, the overall female law school enrollment was 47.2%. *Id.*

3. Vivian Chen, *Looking into the Equity Box*, AM. LAW., Sept. 1, 2010, at 13.

4. Pub. L. No. 88-352, Tit. VII, § 703, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).



women lawyers of color. Part I includes stories and studies of women's struggles at these firms. Part II describes why Title VII has not worked to solve the problems associated with being a successful woman in a law firm. Finally, Part III suggests some potential solutions that may help women be more successful in these environments.

## I. A SNAPSHOT OF THE STATE OF WOMEN LAWYERS

### A. *The Statistics*

The statistics on the success of women lawyers at the largest and most prestigious firms in the United States are not good. According to Department of Labor estimates from 2009, women make up 32.4% of the lawyers in the United States.<sup>5</sup> Yet according to a recent *American Lawyer* survey of the top 200 law firms, women make up only 17% of the partners at the firms surveyed.<sup>6</sup> A survey by the National Association of Women Lawyers placed the number of female partners at the 200 largest law firms at 18%.<sup>7</sup> Women's low partnership rates, according to the *American Lawyer*, occur despite women being "about 51 percent of law school graduates in the last 20 years."<sup>8</sup>

Another telling statistic from the survey is the status of the women who are partners at these firms. Of those women partners who work at firms with multi-tier partnerships, only 45% of them have equity status.<sup>9</sup> This compares to 62% of male partners having equity status. Thus, the majority of the women partners occupy a lower tier of partnership. And it appears that women are taking a tougher hit in terms of employment opportunities due to the recent recession in the United States. The *American Lawyer* recently reported that for the first time since the National Association for Law Placement (NALP) began collecting demographic employment data, diversity in law firm hiring fell. Thus, while women were 32.9% of attorneys in the firms NALP surveyed in 2009, they made up 32.69% of attorneys in 2010.<sup>10</sup>

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5. U.S. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES 206 (2009). The American Bar Association places the percentage at 31%. AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2009, at 1 (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/women/reports/CurrentGlanceStatistics2009.authcheckdam.pdf>.

6. Chen, *supra* note 3, at 13.

7. INST. OF MGMT. & ADMIN. INC., NEW DATA ON MAJOR LAW FIRMS FIND WOMEN LAWYERS EARN LESS THAN THEIR MALE PEERS 1 (2008) [hereinafter NEW DATA].

8. Chen, *supra* note 3, at 13. However, the National Association of Law Placement (NALP) put the percentage of women graduates in the class of 2009 at 46%. NAT'L ASS'N OF LAW PLACEMENT, CLASS OF 2009 NATIONAL SUMMARY REPORT 1 (2009), available at <http://www.nalp.org/uploads/NatlSummaryChartClassof09.pdf>.

9. Chen, *supra* note 3, at 13.

10. Dimitra Kessenides, *Law Firms + Diversity = Declines in Diversity?*, AM. LAW., Nov. 4, 2010, available at <http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1202474473956>.

In addition, studies show that women leave law firm practice at higher rates than their male counterparts. To take an example from a study in a distinct market, researchers at the Massachusetts Institute of Technology studied the top one hundred law firms in Massachusetts. They found that among junior and non-equity partners, one third of women left law firm practice, whereas only 15% of men left practice.<sup>11</sup> This was more than double the rate for women than men.<sup>12</sup> The study also showed that one third of women associates left law practice entirely, whereas less than 20% of male associates did so.<sup>13</sup> Even women who had “made it,” i.e., who had become partners, were more likely to leave their partnerships than male partners—15% of women partners left, whereas only 1% of men did.<sup>14</sup> As one article summed up, “sex strongly predicted exits from law firms and promotion to partnership even when controlling for law school quality, academic distinction in law school, *potential* work experience . . . legal specialization, having taken a leave for child care, marital status, children, current work hours, and measures of social capital.”<sup>15</sup>

It’s not that these women are leaving the workforce. Only 22% of the women in the Massachusetts study who left law firm practice described their status as “unemployed”; thus, the vast majority continue to work.<sup>16</sup> In addition, there is considerable evidence that those who do leave do not “opt out,” but instead are “pushed out.”<sup>17</sup> The National Association of Women Lawyers’s (NAWL) study of the 200 largest law firms in the United States shows the nature of this attrition. Women start at a high of 47% of associates, drop to 30% of “of counsel” lawyers, drop further to 26% of non-equity partners, and bottom out at 16% of equity partners.<sup>18</sup> As one female associate described:

I once heard someone describe their position as a junior associate at a large law firm as the best paying dead-end job they have ever had, and I thought that it was the most accurate description. For the most part associates, particularly female associates, have no interest in becoming

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The representation of minority attorneys among associate ranks likewise declined from 12.59% in 2009 to 12.4% in 2010. *Id.*

11. MONA HARRINGTON & HELEN HSI, MIT WORKPLACE CTR. & SLOAN SCH. OF MGMT., WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP 8 (2007).

12. *Id.*

13. *Id.*

14. *Id.*

15. Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 132 (2004).

16. HARRINGTON & HSI, *supra* note 11, at 10.

17. *See generally* JOAN C. WILLIAMS ET AL., CTR. FOR WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT: THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE 3 (2006).

18. NEW DATA, *supra* note 7, at 1; *see also* Noonan & Corcoran, *supra* note 15, at 137 tbl.1 (showing career paths for University of Michigan Law School graduates over time and the gender gap in lawyers in private practice due to attrition).



a partner at the firms we are currently employed with. But in reality, there are plenty of exit opportunities. I've watched friends and former coworkers go in-house or move to smaller firms. The trouble is, they typically don't pay as well as the large firm.<sup>19</sup>

Minority women lawyers are very likely to drop out of firm practice. A NALP study found that "[b]y 2005, 81% of minority female associates had left their law firms within five years of being hired."<sup>20</sup>

Along with these status gaps go pay gaps. As the NAWL study showed, "[a]t each level of promotion, male lawyers earn more than their female peers."<sup>21</sup> This is consistent with other studies of female partner compensation.<sup>22</sup> A recent study by Marina Angel, Eun-Young Whang, Rajiv Banker, and Joseph Lopez looked at data collected from the Am Law 100 and 200 study and the Vault/MCCA Law Firm Diversity Programs study.<sup>23</sup> They concluded that "women partners are paid less despite the fact that they are not less productive than men partners in generating RPL [revenue per lawyer] for their firms."<sup>24</sup> I remember back in my practice days taking the most senior female partner out for drinks on her fortieth birthday. I now understand why she was so depressed by her status at the firm.

Given that women do not necessarily leave the workforce, it is unsurprising that women are over-represented in lower-paying segments of the legal community. In addition to occupying what amount to "pink ghettos" in law firm practice,<sup>25</sup> women occupy lower-paying jobs in law generally. For example, when it comes to public interest law, according to NALP, 31% of female respondents were public interest lawyers, whereas only 21% of male respondents practiced in this area.<sup>26</sup> In addition, while 9% of women responded that they worked in civil legal services or public defender offices, nonprofits or education, and public interest, only 4% of men reported working in this sector. Percentages

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19. HARRINGTON & HSI, *supra* note 11, at 8.

20. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 1* (2006) [hereinafter *VISIBLE INVISIBILITY*]. For an interesting assessment of the state of Latina lawyers, see HISPANIC NAT'L BAR ASS'N, *FEW AND FAR BETWEEN: THE REALITY OF LATINA LAWYERS* (2009).

21. NEW DATA, *supra* note 7, at 2.

22. See Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 897-98 (2005).

23. Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation 2* (Temple Univ. Beasley Sch. of Law, Paper No. 2010-24), available at <http://ssrn.com/abstract=1674630> (discussing data collected from 2002 to 2007); see also Noonan & Corcoran, *supra* note 15, at 144 (discussing a study of University of Michigan Law School graduates showing that male partners' earnings were on average 32% higher than those of female partners).

24. Angel et al., *supra* note 23, at 3.

25. Chen, *supra* note 3, at 13.

26. Katie Dilks, *Why Is Nobody Talking About Gender Diversity in Public Interest Law?*, NALP BULL., June 2010, at 1.



for government employment were the same—roughly the same number of men and women reported working for the government.<sup>27</sup> Thus, women lawyers tend to be over-represented in many lower-paying, lower-status jobs.

Interestingly, Irene Segal Ayers recently has suggested that law schools are also part of the problem when it comes to the success of women, and particularly women lawyers of color, in large law firm practice.<sup>28</sup> While others have criticized the use of the Socratic method and the competitive nature of law schools' impact on the educational opportunities of women,<sup>29</sup> Ayers's approach takes on the nearly exclusive focus of law schools on legal analysis that was criticized in the Carnegie Report.<sup>30</sup> Relying on the narratives of African-American women lawyers, Ayers highlighted how many of these lawyers found their law school experiences dull and disengaging.<sup>31</sup> In addition, because these lawyers were put off by the narrow curriculum and competitive nature of law school, they disengaged from not only classes, but also other law school-related activities.<sup>32</sup> Ayers now argues that students buy into the common law school myth of "effortless genius"—essentially, that a small group of law students just naturally "have it."<sup>33</sup> These are the "A" students, and the rest are never going to "get it." Once students decide they are not among the "haves," they disengage. Thus, opportunities created by law review participation and other aspects of law school (including the training that does occur by taking coursework seriously) were lost on these students. Instead, many of these women lawyers of color owed their success to excellent mentoring opportunities.<sup>34</sup> Interestingly, most of the women she studied who started out in traditional law firm settings had little to no mentoring opportunities, which greatly affected their progress at their firms.<sup>35</sup> For those who had a good experience, mentoring appeared to be the key. Unfortunately, large law school classes do not offer those mentoring opportunities, and, as I describe below, women and members of minority groups often do not have that relationship in practice. Ayers's argument is that law

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27. *Id.*

28. Irene Segal Ayers, *The Undertraining of Lawyers and Its Effect on the Advancement of Women and Minorities in the Legal Profession*, 1 DUKE F.L. & SOC. CHANGE 71, 71 (2009).

29. One of the best known works on this topic is LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997). *See also* CARRIE YANG COSTELLO, *PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS* (2005); *see generally* Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389 (2006); Sarah Berger et al., "Hey! There's Ladies Here!!," 73 N.Y.U. L. REV. 1022 (1998) (reviewing several studies and hypotheses concerning gender differences in legal education).

30. *See* WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 5-7* (2007).

31. Ayers, *supra* note 28, at 84-89.

32. *See id.* at 87-89.

33. *Id.* at 87.

34. *Id.* at 92-96.

35. *Id.* at 89-92.

schools' failure to sufficiently train women and lawyers of color exacerbates problems they already experience resulting from the lack of mentoring in law firms.

### *B. The Intangibles*

Other surveys of women lawyers have focused on the qualitative nature of their practices in terms of opportunities, experiences, and quality of work.<sup>36</sup> The American Bar Association's Commission on Women in the Profession has identified several obstacles to women's success in the profession, including gender stereotypes, lack of mentoring and support networks, inflexible work structures, sexual harassment, and gender bias in the justice system itself.<sup>37</sup> Many women lawyers complain about receiving less desirable assignments—essentially grunt work or “easy” work such as document review and cases no one else wanted.<sup>38</sup> They also note that they have fewer mentoring opportunities with partners and more senior lawyers than their male colleagues.<sup>39</sup> In addition, they are asked to participate less in rainmaking opportunities than their male colleagues.<sup>40</sup> In a survey by the American Bar Association, 43% of women of color and 55% of white women complained that they had limited client contact and client development opportunities, whereas only 3% of white males surveyed had similar complaints.<sup>41</sup>

Women still face considerable work/life balance issues that their male

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36. I will not canvass all the research on this subject because it is vast. Instead, I will provide a summary.

37. DEBORAH L. RHODE, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 14-22 (2001) [hereinafter RHODE, UNFINISHED AGENDA] (describing these obstacles); see also VISIBLE INVISIBILITY, *supra* note 20, at 12-17 (describing the experiences of women of color with respect to the lack of mentoring opportunities); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2273-76 (2010) (dividing stereotypes applied to women in large law firms into three categories).

38. See VISIBLE INVISIBILITY, *supra* note 20, at 21-23; Steve French, Note, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189, 202-03 (2000).

39. See RHODE, UNFINISHED AGENDA, *supra* note 37, at 16. Interestingly, some studies suggest that women receive more mentoring, but commentators have opined that women perceive mentoring more than their male colleagues. Thus, male associates will not perceive a relationship with a senior partner as mentoring, whereas women will. See French, *supra* note 38, at 200. Yet women perceive that they do not have the same mentoring opportunities as their male counterparts. See *id.* at 200-01.

40. See VISIBLE INVISIBILITY, *supra* note 20, at 19-21 (describing the experience of women lawyers of color).

41. *Id.* at 19. Men of color likewise complained less of this than did women attorneys. Only 24% of men of color complained of limited access to client development opportunities. *Id.*



colleagues either do not face or face to a much lesser degree.<sup>42</sup> In the Massachusetts survey, the most common (over 60% reported this) reason women gave for leaving firm practice, whether they were associates, junior partners, or partners, was “difficulty integrating work with family/personal life.”<sup>43</sup> Family obligations also affected perceptions of lawyers. In an ABA national survey of 920 lawyers who had at some point in their careers worked in firms of twenty-five or more lawyers,<sup>44</sup> 72% of women surveyed said that their career commitment was questioned when they gave birth to or adopted a child, whereas only 15% of men of color and 9% of white men responded yes to this.<sup>45</sup> The Massachusetts survey found that for men, the most common reasons for leaving practice were “long work hours” and “work load pressures.”<sup>46</sup> Family reasons ranked third.<sup>47</sup>

One would think that part-time work options would help women lawyers with significant family obligations. However, where flexible arrangements exist, few take part in them.<sup>48</sup> Even when women choose part-time work to accommodate busy home lives, they often sacrifice prestige and quality in work assignments.<sup>49</sup> As one woman lawyer study respondent explained, taking part-time status “completely, utterly and irreversibly altered my future, my practice, my reputation and my relationships.”<sup>50</sup>

## II. WHY TITLE VII HASN'T RESULTED IN MATERIAL GAINS FOR WOMEN LAWYERS

Many commentators have discussed why Title VII has not solved retention and promotion problems encountered by women lawyers.<sup>51</sup> Some opine that the

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42. See *id.* at 33-34 (describing the experiences of women lawyers); French, *supra* note 38, at 197-99.

43. HARRINGTON & HSI, *supra* note 11, at 12-13.

44. VISIBLE INVISIBILITY, *supra* note 20, at 5-6.

45. *Id.* at 33-34.

46. HARRINGTON & HSI, note 11, at 12-13.

47. *Id.*

48. DEBORAH L. RHODE, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 15-16 (2001) [hereinafter RHODE, *BALANCED LIVES*] (noting that few lawyers take advantage of part-time programs when they are provided).

49. See *id.* at 16 (recounting study responses); RHODE, *UNFINISHED AGENDA*, *supra* note 37, at 17-18; Hope Viner Samborn, *Higher Hurdles for Women*, 86 A.B.A. J. 30, 32 (2000) (finding that 46% of women surveyed believed that taking part-time status after becoming a parent would very likely have an adverse impact on advancement and 35% of women thought it somewhat likely).

50. RHODE, *BALANCED LIVES*, *supra* note 48, at 16 (quoting WOMEN'S BAR ASS'N OF MASS., *MORE THAN PART-TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS* 32 (2000)).

51. See, e.g., Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers*,



structure of Title VII makes it difficult for plaintiffs to challenge more subtle and unconscious forms of bias, such as mentoring opportunities, assignments, and outside activities, which become the basis for more opportunities in the law firm long-term.<sup>52</sup> The studies suggesting that women receive uninteresting assignments and grunt work and do not have the same mentoring opportunities support this. Others suggest that the burden of proof under Title VII is too difficult for women employee-plaintiffs to meet.<sup>53</sup> In addition, some have asserted that the problem in law firm reform has both cultural and economic dimensions.<sup>54</sup> It is not my intention to rehash the arguments of these commentators. Instead, I will focus on what I consider to be the problems that most affect women's successes in these cases.

One of the most significant problems is that courts are very deferential to law firm decisionmaking. In general, courts do not like interfering with or second-guessing high level discretionary and subjective employment decisions.<sup>55</sup> One of the classic cases involving a woman lawyer is *Ezold v. Wolf, Block, Schorr & Solis-Cohen*.<sup>56</sup> In *Ezold*, plaintiff Nancy O'Mara Ezold was denied partnership at her firm, Wolf, Block, Schorr & Solis-Cohen ("Wolf, Block"). After a trial on the merits, the district court judge held for Ezold on her claim that the firm had

*Litigation Prevention Measures, and the Limits of Anti-Discrimination Law*, 6 COLUM. J. GENDER & L. 323 (1996); Nancy J. Farrer, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY'S L.J. 529 (1997); Latourette, *supra* note 22, at 884-93; LeeAnn O'Neill, *Hitting the Legal Diversity Market Home: Minority Women Strike Out*, 3 MOD. AM. 7 (2007); Amanda J. Albert, Note, *The Use of MacKinnon's Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders Within Large Law Firms*, 35 HOFSTRA L. REV. 291 (2006); Eyana J. Smith, Comment, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789 (2004).

52. See, e.g., Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV C.R.-C.L. L. REV. 481, 487-88 (2005).

53. See, e.g., Smith, *supra* note 51, at 806-07.

54. See, e.g., Latourette, *supra* note 22, at 861; French, *supra* note 38, at 194-95 (explaining how economic changes to the business of law have affected partnership requirements).

55. See Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 268, 288-301 (1994) (describing cases); Latourette, *supra* note 22, at 886-89. For reasons why courts are so deferential to this type of employer decisionmaking, see Baron, *supra*, at 301-04.

56. 983 F.2d 509 (3d Cir. 1992). The court in this case acknowledged that it was the first case in which a discrimination claim arising in the context of law firm partnership required appellate review. *Id.* at 512. Thus, it is not surprising that commentators have found it significant. Many have discussed problems with this case. See, e.g., Baron, *supra* note 55, at 299-301; Latourette, *supra* note 22, at 886-89; French, *supra* note 38, at 206-08; Rachel B. Grand, Note, *"It's Only Disclosure": A Modest Proposal for Partnership Reform*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 389, 405-06 (2005); Lee, *supra* note 52, at 500; Eunice Chwenyen Peters, Note, *Making It to the Brochure but Not to Partnership*, 45 WASHBURN L.J. 625, 637-39 (2006).

discriminated based on sex in denying her partnership.<sup>57</sup> Interestingly, the Third Circuit Court of Appeals reversed, holding that the trial court's factfinding was "clearly erroneous" and that Ezold had not shown that the firm's reason for denying her partnership was a pretext for sex discrimination.<sup>58</sup> In many ways, the experiences of Nancy Ezold reflect those described in studies of women lawyers.

Even before she was hired, Ezold was told by the assigning attorney in the litigation department, Seymour ("Sy") Kurland, "that it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman, had not attended an Ivy League law school, and had not been on law review."<sup>59</sup> Although Ezold handled cases at all stages of litigation and eventually supervised junior associates, she was primarily assigned to "small cases" by the firm's standards.<sup>60</sup> Ezold became aware of the informal assignment process, whereby partners would choose to work with associates directly, bypassing the formal assignment structure.<sup>61</sup> She complained about both the quality of her assignments and the small number of partners for whom she had the opportunity to work.<sup>62</sup> Indeed, one partner explained that Ezold was in a classic "Catch 22":

[T]he perception that she is not able to grasp complex issues or handle complex cases . . . appears to be a product of how Sy Kurland viewed Nancy's role when she was initially hired. For the first few years Sy would only assign Nancy to non-complex matters, yet, at evaluation time, Sy, and some other partners would qualify their evaluations by saying that Nancy does not work on complex matters. Nancy was literally trapped in a Catch 22. The [c]hairman of the [l]itigation [d]epartment would not assign her to complex cases, yet she received negative evaluations for not working on complex cases.<sup>63</sup>

The trial court agreed with Ezold's contention that her "lack of opportunity to work with a significant number of partners seriously impaired her opportunity to be fairly evaluated for partnership."<sup>64</sup>

The reason provided by the firm for not promoting Ezold to partnership was her lack of skills in legal analysis.<sup>65</sup> This was not, however, the only criteria for partnership. Candidates were also evaluated on "legal writing and drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating and advocacy, promptness and efficiency."<sup>66</sup> Personal characteristics were

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57. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1191-92 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1993).

58. *Ezold*, 983 F.2d at 512-13.

59. *Ezold*, 751 F. Supp. at 1177.

60. *See id.* at 1178.

61. *Id.*

62. *Id.*

63. *Id.* at 1179.

64. *Id.*

65. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 512 (3d Cir. 1992).

66. *Id.* at 515.



evaluated as well, including "reliability, taking and managing responsibility, flexibility, growth potential, attitude, client relationship, client servicing and development, ability under pressure, ability to work independently, and dedication."<sup>67</sup> As is obvious from the nature of these criteria, they are quite subjective.

The trial court concluded that Wolf, Block had discriminated based on sex in failing to promote Ezold to partnership.<sup>68</sup> However, the Third Circuit Court of Appeals reversed, finding the trial court's factfinding "clearly erroneous."<sup>69</sup> Essentially, the two courts disagreed about whether Wolf, Block's legitimate nondiscriminatory reason for denying Ezold full partnership—that she lacked the requisite legal analytical skills—was a pretext for sex discrimination. The trial court reviewed evidence that revealed Ezold's strengths as a partnership candidate.<sup>70</sup> For example, Sy noted in Ezold's evaluations that she was particularly good at trial work—an area in which the firm needed people with such skills.<sup>71</sup> In addition, during the period leading up to her partnership consideration, partners for whom Ezold had performed substantial work rated her quite positively.<sup>72</sup> The trial judge canvassed the many positive evaluations Ezold received from partners regarding her courtroom skills and dedication.<sup>73</sup> The trial judge then made a detailed comparison of males who made partner and found that "[m]ale associates who received evaluations no better than the plaintiff and sometimes less favorable than the plaintiff were made partners."<sup>74</sup> The judge reviewed the evaluations of eight male associates in reaching this conclusion.<sup>75</sup>

Yet the Third Circuit concluded that the trial judge's factfinding was clearly erroneous. The main problem the court of appeals had with the trial judge's reasoning was with respect to his analysis of comparator male associates who became partner. The court of appeals concluded that the trial judge looked at the male associates' overall evaluations without honing in on the factor that prevented Ezold from making partner—her lack of analytical skills.<sup>76</sup> Even though partnership determinations took into account a host of factors, as described above, and Ezold compared quite favorably to (and in some instances better than) the males who made partner on some of the criteria, the court of appeals limited its factual analysis to this one factor. In doing so, it focused on a single tree without seeing the forest. The court of appeals went through an associate-by-associate analysis of the evaluations, essentially redoing the trial

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67. *Id.*

68. *Ezold*, 751 F. Supp. at 1192.

69. *Ezold*, 983 F.2d at 547.

70. *Ezold*, 751 F. Supp. at 1180.

71. *Id.*

72. *Id.* at 1182.

73. *Id.* at 1182-83.

74. *Id.* at 1184.

75. *Id.* at 1185-87.

76. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 524-25 (3d Cir. 1992).



court's factfinding.<sup>77</sup> Some of the male associates who made partner had problems that were quite significant. For example, one associate was criticized by several partners for his work habits.<sup>78</sup> As one partner explained about this associate, "There has been a recurrent problem where he simply disappears without notice, sometimes for a couple of days, and sometimes on extended vacations."<sup>79</sup> Another partner called him "lazy," and still another partner noted that he needed to "apply himself diligently."<sup>80</sup> Yet this associate made partner. Another male associate who made partner lacked language skills.<sup>81</sup> And in one situation that bordered on malpractice, a male associate actually did not respond to a complaint in a timely manner and still made partner.<sup>82</sup> Thus, it is understandable why the trial court could conclude that something was amiss with denying Ezold partnership while these other male associates were promoted.

In disagreeing with the trial court's evaluation of the evidence, the court of appeals applied a high standard for plaintiffs to meet in cases involving subjective criteria. As the court explained, "In a comparison of subjective factors such as legal ability, it must be *obvious or manifest* that the subjective standard was unequally applied before a court can find pretext."<sup>83</sup> It also acknowledged its reluctance to second-guess this type of employer decisionmaking. The court explained that "a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions."<sup>84</sup> Noting that, like cases involving tenure, decisions about who becomes partner are subjective, the court explained that the "cautions against 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualifications for promotion within a profession inform[ed]" its analysis of Ezold's case.<sup>85</sup>

Ezold's experience is not uncommon. As one commentator summed up after reviewing case law involving women lawyers: "[C]ases suggest that in order to prevail in a sex discrimination case, one must present rather compelling evidence of patently unfair behavior and distinct differences in the treatment of males and females, with historical discriminatory policies toward women providing supporting evidence of an employer's discriminatory intent."<sup>86</sup> Who makes partner and who gets assigned to a case are the types of employment decisions with which courts are uncomfortable. Indeed, the Third Circuit accepted that Wolf, Block did not assign Ezold to complex cases at first because of her academic credentials, even though she had been practicing law for a number of

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77. *Id.* at 533-38.

78. *Id.* at 535.

79. *Ezold*, 751 F. Supp. at 1185.

80. *Id.* at 1185-86.

81. *Ezold*, 983 F.2d at 535.

82. *Id.* at 536.

83. *Id.* at 534 (emphasis added).

84. *Id.* at 527 (quoting *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir. 1991)).

85. *Id.*

86. Latourette, *supra* note 22, at 889.

years at the time they hired her.<sup>87</sup>

Another problem for women lawyers wishing to use Title VII is that many women lawyers do not work at firms that would be covered by Title VII—the primary federal anti-discrimination law that covers sex discrimination. Title VII only covers employers of fifteen or more.<sup>88</sup> Most lawyers work in small firms that have fewer than fifteen lawyers and therefore fewer than fifteen employees,<sup>89</sup> which means many will not be covered by Title VII.<sup>90</sup> In addition, Title VII generally does not cover discrimination aimed at partners, who are not always considered employees.<sup>91</sup> For these reasons and others,<sup>92</sup> Title VII has not provided significant relief to women who seek partnership.

### III. POTENTIAL SOLUTIONS

In order for women to be successful in legal practice in large firms, change must come from a variety of sources. Clearly, the law alone will not bring about the type of change that will significantly increase women's numbers in the partnership ranks at large firms. Instead, I am suggesting change in three areas. First, large law firms themselves must lead the way. Second, law schools have a role to play. Finally, the courts also can contribute to the progress of women in these firms.

#### *A. How to Effect Change in Law Firms*

Many have suggested solutions to the various problems women have encountered in legal practice.<sup>93</sup> Yet even though such prestigious groups as the

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87. *Ezold*, 983 F.2d at 541.

88. *See* 42 U.S.C. § 2000e(b) (2006).

89. Note that support staff would be included in this calculation.

90. As of 2000, 76% of firms consisted of two to five lawyers, 13% of six to ten lawyers, and 6% of eleven to twenty lawyers. AM. BAR ASS'N, *LAWYER DEMOGRAPHICS* (2009), available at [http://new.abanet.org/marketresearch/PublicDocuments/Lawyer\\_Demographics.pdf](http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf). According to another report commissioned by the ABA in 2000, nearly 70% of lawyers worked in firms of ten lawyers or less. CLARA N. CARSON, AM. BAR FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000*, at 29 (2004).

91. *See Solon v. Kaplan*, 398 F.3d 629, 633-34 (7th Cir. 2005) (granting summary judgment in Title VII retaliation lawsuit because partner was not an "employee" for purposes of Title VII); *see also* Lauren Winters, *Partners Without Power: Protecting Law Firm Partners from Discrimination*, 39 U.S.F. L. REV. 413, 418-20 (2005) (describing problems with partners suing); *see generally* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 449-50 (2003) (setting out factors used to determine whether physician who was director-shareholder could be considered an "employee" for purposes of the Americans with Disabilities Act).

92. *See, e.g.,* Alison I. Stein, *Women Lawyers Blog for Workplace Equality: Blogging as a Feminist Legal Method*, 20 YALE J.L. & FEMINISM 357, 372-73 (2009) (suggesting that women lawyers have abandoned courts as a means to social change); French, *supra* note 38, at 212; Smith, *supra* note 51, at 807-08.

93. *See, e.g.,* RHODE, *BALANCED LIVES*, *supra* note 48, at 22-25; Megan Erb, Note, *Red*



American Bar Association have taken on the issues facing women lawyers, little has changed.<sup>94</sup> Organizational change can be difficult. However, it is possible for organizations, including law firms, to change under the right circumstances. There are two factors that consistently appear necessary for organizational change. The first is buy-in from top-level management. The second is holding accountable those assigned to implement the change.

Nancy Levit, in her insightful article about the efficacy of class actions in eliminating or remedying discrimination, found both of these factors present in situations where change actually was successful as a result of class action litigation.<sup>95</sup> When corporations had a true desire to diversify their workforce, which was reflected in the will of top-level management, and that management held lower-level managers accountable for accomplishing this, there was positive change.<sup>96</sup> Levit's findings with respect to class actions that did result in diversity in the workplace and those that did not are consistent with organizational research.<sup>97</sup>

How does this apply to women in law firms? While women can no longer be considered newcomers to legal practice, they are newcomers in terms of being partners at top law firms. Increasing the percentage of women of influence in law firms means diversifying the partnership ranks. Thus, the problems with accomplishing this diversification parallel the cases described by Levit. In order to truly gender-diversify law firms, it will take commitment by the firm's leaders—influential partners, management committees, managing partners, etc. However, that likely will not be enough. There must be accountability as well. This could include considering whether a partner uses a diverse group of associates or non-equity partners to staff his or her cases in setting compensation. Indeed, in-house corporate counsels have led the way on diversifying their staff and have used compensation as a means to reward diversity efforts.<sup>98</sup> Some firms have set up diversity committees to create policies and procedures to help firm management effectuate diversity goals.<sup>99</sup>

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*Light, Green Light: Assessing the Stop and Go in the Advancement of Women in the Legal and Business Sectors*, 14 WM. & MARY J. WOMEN & L. 393, 407-20 (2008).

94. See Kathleen Wu, *What's Changed for Women Lawyers in the Past Decade? Not a Whole Lot, Frankly*, 49 ADVOCATE 21, 21 (2009) (noting that there was only a 6% jump in the percentage of women partners according to NALP data in the fifteen years between 1993, when NALP began tracking this, and 2008).

95. Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 392-93 (2008).

96. *Id.* at 414. For an explanation of the importance of commitment of corporate executives, see *id.* at 417-18, 424. For an explanation of the importance of accountability, see *id.* at 418-24.

97. See *id.* at 420-24 (discussing studies).

98. See Kara Mayer Robinson, *Beyond the Basics: Three Corporate Legal Departments Take Diversity Efforts to the Next Level*, DIVERSITY & THE BAR (2007), available at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1395> (describing in-house counsel program at Lucent Technologies/Alcatel-Lucent that includes ties to compensation).

99. See Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms:*



In addition, some of the changes must take on the intangibles that keep women from succeeding. Mentoring must be universal and institutionally encouraged<sup>100</sup>—not just left to happenstance occurrence. While women lawyers have noted that the best mentoring relationships occur naturally,<sup>101</sup> in an ABA survey, women of color and white women disproportionately responded that they wanted more and better mentoring.<sup>102</sup> Thus, it appears that lack of or insufficient mentoring is a significant problem for these women. In addition, work assignments must be given out fairly. From the studies of women lawyers, lack of mentoring and the unfair distribution of more interesting assignments are clearly hampering the development of women lawyers' skills.<sup>103</sup> This certainly was the case for Nancy Ezold. If partner compensation were tied in part to the use of a diverse group of lawyers, it is reasonable to believe that assignments would be spread around all the lawyers and not just the favored few, who often do not include women.

Finally, firms must be flexible for women who have child care or other family care responsibilities. Because work/family conflict appears to play a role in why women leave large law firm practice, firms will have to adopt and actually encourage creative strategies to get at this problem if they want to retain women lawyers. The existence of an underused part-time program is not enough. The program actually must operate in a fair manner and not create a perception (or a reality) that those who take advantage of it are no longer taken seriously as lawyers at the firm. Joan Williams and Cynthia Thomas Calvert have written extensively about effective part-time policies.<sup>104</sup> Thus, there are already

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*Steadied or Simply Studied?*, 76 *FORDHAM L. REV.* 1941, 1966-67 (2008) (describing such law firm efforts).

100. See Noonan & Corcoran, *supra* note 15, at 141-43 (discussing a study showing that having a mentor is related to increased chances of women making partner and to making it less likely that a lawyer will leave).

101. *VISIBLE INVISIBILITY*, *supra* note 20, at 13.

102. *Id.* at 12. "Sixty-seven percent of women of color in the survey wanted more and better mentoring," as did 55% of white women, whereas only 32% of white men surveyed made this statement. *Id.* Interestingly, this was also common of men of color, 52% of whom wanted more and better mentoring. *Id.*

103. Anita Hill's experience as a new associate provides an excellent example. As she explains:

There were some exciting projects at Wald's, but none were included among my assignments, many of which were in the area of banking law. This was not considered the most interesting or extensive part of the firm's practice, so there wasn't much competition among associates to do it. . . . I did not receive the "choice assignment," but rather was assigned to work with partners like the banking expert, who was thought to be difficult. Certainly, no other partner stepped in to take me under his or her wing or to teach me about functioning in what was for me a completely new environment.

ANITA HILL, *SPEAKING TRUTH TO POWER* 56, 58 (1997).

104. See, e.g., Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention*, 8 *WM. & MARY J.*

guidelines out there for firms to follow; they need not reinvent the wheel when it comes to effective part-time programs.

### *B. The Role of Law Schools*

If Ayers is correct, law schools need to train students differently. Ayers's approach is consistent with the Carnegie Report and suggests a more collaborative, mentoring-based approach to law school classes.<sup>105</sup> Ayers identified several common themes in the lawyers' stories she examined. She argues that law schools should focus on improvement, including regular assessment, rather than on the myth of fixed legal ability.<sup>106</sup> Another feature of the stories of successful African-American women lawyers Ayers describes was the egalitarian relationship they had with their mentors and/or teachers.<sup>107</sup> These young lawyers and students were permitted to question their teachers and were treated as equals. There was also an emphasis on collaboration and teamwork.<sup>108</sup> In addition, being permitted to engage in legal creativity and small group learning likewise contributed to the positive experiences of these women.<sup>109</sup> While creative legal thinking could be emphasized and encouraged in the current law school classroom, small groups might be more difficult, given the resources it takes to teach in a small group environment. At the least, though, law schools could make sure that students have some small class experiences that emphasize small group collaboration. In addition, using small groups in larger classes could likewise replicate this kind of experience. If, from these experiences, women are armed with the knowledge and skills they need to hit the ground running at law firms, they will feel and be more competent and confident.

### *C. The Role of the Courts*

There is little doubt that women lawyers have not been very successful as plaintiffs in courts. This and fear of retaliation from the legal community<sup>110</sup> has led some women lawyers to abandon the courts altogether in seeking relief.<sup>111</sup> As one commentator has argued, women lawyers "have rejected the viability of the law as a means of personal advocacy and are instead using blogging—an

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WOMEN & L. 357 (2002).

105. See Ayers, *supra* note 28, at 92-96.

106. *Id.* at 97.

107. *Id.* at 98.

108. *Id.*

109. *Id.* at 99.

110. See French, *supra* note 38, at 212; Smith, *supra* note 51, at 807-08. In one telling lawsuit, women law students challenging the employment practices of a law firm sued as "Does" to avoid identification. *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979).

111. Stein, *supra* note 92, at 372-73 (suggesting that women lawyers have abandoned courts as a means to social change).



alternative, informal, and often anonymous form of engagement—to advocate for their rights and interests in the workplace.”<sup>112</sup> While blogging is one way to raise awareness and advocate for the rights of women lawyers, I’m reluctant to give up on the courts. Case law tells powerful stories;<sup>113</sup> women lawyers should not give up on participating in creating these stories without a fight.

It appears that judges’ deference to law firm decisionmakers is a significant problem. Judges need to look at Title VII sex discrimination cases involving women lawyers more closely and critically. One commentator has suggested that employers should carry the burden of persuasion to demonstrate that their decisionmaking process is “neither arbitrary nor overly subjective.”<sup>114</sup> To encourage law firms to develop more objective standards by which to assess the performance of women lawyers, law firms that adopted objective systems of evaluation would receive a more deferential standard under Title VII.<sup>115</sup> This commentator suggested several factors that courts could use in deciding whether a law firm has adopted an objective system, including its efforts to eliminate gender stereotyping at the firm, whether it monitored the distribution of work assignments, whether it limited evaluations to persons truly familiar with the attorney’s work, and whether it took steps to eliminate vagueness in the evaluation process.<sup>116</sup> Indeed, the American Bar Association has recognized difficulties for women attorneys inherent in the evaluation process and has suggested improvements in the evaluation systems that law firms use.<sup>117</sup> These are some good suggestions.

Another interesting proposal is aimed more at lawyers who represent plaintiffs in these cases. One commentator has suggested that plaintiffs use expert witnesses to help judges and jurors alike understand how unconscious forms of bias as well as stereotyping might lead to the type of more subtle

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112. *Id.* at 361. One commentator proposed another interesting proposal to improve the partnership chances of women lawyers—the use of SEC-type disclosures regarding law firms’ systems of evaluating associates for partnership. *See* Grand, *supra* note 56, at 407-10.

113. As Linda Hamilton Krieger and Susan Fiske put well,

Although civil litigation is in many ways highly technical, at the end of the day, lawsuits tell stories. Because judicial opinions incorporate popular, taken-for-granted assumptions about the common nature of things, they function as a society’s core stories; they offer an interpretation of experience and provide the participants of future lawsuits a narrative comprising a set of easily recognized plots, symbols, themes, and characters.

Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1024 (2006).

114. Baron, *supra* note 55, at 309.

115. *See id.* at 309-10.

116. *Id.* at 311-13.

117. *See generally* JOAN C. WILLIAMS & CONSUELA A. PINTO, AM. BAR ASS’N COMM’N ON WOMEN IN THE PROFESSION, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS (2d ed. 2008).



discrimination that women lawyers experience.<sup>118</sup> Thus, plaintiffs' lawyers in these cases should use creative strategies to help factfinders understand the significance of evidence of bias—such as Ezold's assigning partner's statements that she would have a hard time at the firm because she was a woman without an Ivy League degree. However, without buy-in from the courts that this type of evidence reveals something about the attitudes of the firm about women and the courts' questioning of subjective criteria, little will change.

### CONCLUSION

Women lawyers continue to struggle in large law firms in the United States. This persists even after years of being close to (and some years more than) 50% of law school graduates. Law firms have been remarkably resistant to real change that will have a significant effect on the success of women lawyers. Yet Title VII of the Civil Rights Act of 1964 has prohibited sex discrimination for more than forty years now. Title VII has not proven to be as helpful to the prosperity of women lawyers as one might expect. There are a variety of reasons for this, but one significant problem is the subjective nature of law firm promotion processes and the courts' unwillingness to subject the processes to real scrutiny. For women to really succeed in this environment, change will have to come on multiple fronts. This essay discusses three of those fronts—law firms, law schools, and the courts. This essay is the just the beginning of the discussion, however. Convincing these three differing entities that change is necessary and, indeed, in the best interest of their firms, schools and institutional authority, will have to wait for another day.

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118. See Lee, *supra* note 52, at 500-01.



# “THE MESS WE’RE IN”\*: FIVE STEPS TOWARDS THE TRANSFORMATION OF PRISON CULTURES

LYNN S. BRANHAM\*\*

Whether working with correctional officials, policy makers, victims’ advocates, prisoners’ advocates, researchers, or others concerned about the efficacy and costs, both tangible and intangible, of incarceration, a question I commonly hear is: “How can and should prison conditions be improved?” But I think that this question misses the mark. Of course prison conditions can and should be improved to produce what perhaps appropriately, but impersonally, are referred to as “better outcomes.” Few of those who are familiar with prisons and the persons confined within them would argue that the status quo is acceptable: that, for example, the vast numbers of prisoners with substance abuse and mental health problems should continue to never have those problems addressed, and addressed effectively, while they are incarcerated;<sup>1</sup> that prisoners who are

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\* See President Ronald Reagan, Remarks at a Reception for Members of the Associated General Contractors of America (Mar. 16, 1981), *available at* <http://www.reagan.utexas.edu/archives/speeches/1981/31681c.htm> [hereinafter Reagan Remarks].

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1. In 2006, 65% of the prisoners in state prisons and 55% of federal prisoners met the medical criteria delineated in the *Diagnostic and Statistical Manual for Mental Disorders* (DSM) for having a “substance use disorder.” NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA’S PRISON POPULATION 23, 25 (2010), *available at* <http://www.casacolumbia.org/articlefiles/575-report2010behindbars2.pdf>. However, less than one in five of these inmates with the disorder—14% of the state prisoners and 16% of the federal prisoners—received some form of substance-abuse treatment. *Id.* at 40.

Even when prisoners with a substance abuse problem do receive treatment, much of that treatment is deficient in quality. In a national study on the extent to which correctional substance abuse treatment programs comport with the thirteen evidence-based practices considered necessary for effective treatment, prison administrators reported that the treatment programs in their prisons incorporated an average of only 5.9 of the prescribed evidence-based practices. Peter D. Friedmann et al., *Evidence-Based Treatment Practices for Drug-Involved Adults in the Criminal Justice System*, 32 J. SUBSTANCE ABUSE TREATMENT 267, 267-68, 272 (2007). Although the assessments of these treatment programs by their directors differed somewhat from those of the prison administrators, the directors also reported significant departures from basic treatment protocols. According to these treatment providers, the substance abuse treatment programs in the prisons adhered to, on average, only 7.8 of the thirteen evidence-based practices. *Id.* at 272.

A high percentage of prisoners—in 2005, 56% of state inmates and 45% of federal inmates—also have mental health problems. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (2006), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=789>. Yet the majority of these ill prisoners receive no mental health treatment while in prison. *See id.* at 9 (reporting that in 2005, only 34% of the state prisoners and 24% of the federal prisoners who were mentally ill had received mental health treatment since their incarceration). For an in-depth discussion of the failure to meet the healthcare needs of mentally ill prisoners, see HUMAN RIGHTS



functionally illiterate or otherwise uneducated should continue to leave prison without concerted efforts to rectify those educational deficits;<sup>2</sup> and that inmates with few, if any, job skills should continue to sit idly in their cells or dorms rather than participate in vocational training or work programs that might facilitate their successful reentry into our communities.<sup>3</sup>

The more fundamental question though, one that is raised with rarity, is: “Can prisons be not just changed and improved, but transformed?” This question can, in turn, spark a debate about what “transformation” means in the abstract and what it might mean, or could mean, in the prison context. While the lure of entering into this debate is inviting, suffice it to say that for the purposes of this Article and the ideas propounded within it, transformation entails changes that are not merely at the periphery or even solely external. Transformation instead refers to deeper, sustained, and indeed radical changes—changes in the ethos of those who work and live in prisons.

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WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), *available at* <http://www.hrw.org/en/node/12252/section1>.

2. In 2003, 57% of prisoners had not received a high school diploma or GED. *See* ELIZABETH GREENBERG ET AL., U.S. DEP’T OF EDUC., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 48 (2007), *available at* <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007473> [hereinafter PRISON LITERACY SURVEY]. Half, or more than half, of them functioned at the two lowest literacy levels, with the exact figure depending on the type of literacy being measured. *Id.* at 13 (reporting that 56% of prisoners were at the basic, or below basic, literacy level in “prose” literacy, 50% fell within one of these two lowest literacy levels in “document” literacy, and 78% measured at the basic or below basic level on the “quantitative” literacy scale). Many prisoners’ literacy skills are so deficient that they would be unable to locate an intersection on a straightforward street map or determine the time of an appointment from an appointment slip. *See id.* at 5-7, 13.

Most prisons offer some educational programming to a segment of their prison populations. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1, 4 (2003), *available at* [http://www.policyalmanac.org/crime/archive/education\\_prisons.pdf](http://www.policyalmanac.org/crime/archive/education_prisons.pdf). But relatively few prisoners are enrolled in an academic program at any one time. In 2003, only 5% of prisoners were enrolled in an academic class, though an additional 19% of prisoners had received their high school diploma or GED while serving their current prison sentences. PRISON LITERACY SURVEY, *supra*, at 48.

3. The majority of prisoners surveyed in 2003 had received no vocational training since their incarceration, and most of those who had were trained for a relatively short period of time. PRISON LITERACY SURVEY, *supra* note 2, at 51 (reporting that 71% of the prisoners had received no vocational training, 11% participated in a vocational training program lasting less than six months, and 8% participated in a vocational training program lasting six to twelve months). And while a little over half of the prisoners eligible to work in prison—some are foreclosed from working for security or medical reasons—have job assignments, the vast majority of these inmates work in positions geared toward facility operations, such as janitorial and laundry work, rather than jobs specifically tailored to prepare them for reentry. AMY L. SOLOMON ET AL., URBAN INST., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 16 (2004), *available at* [http://www.urban.org/uploadedPDF/411097\\_From\\_Prison\\_to\\_work.pdf](http://www.urban.org/uploadedPDF/411097_From_Prison_to_work.pdf).

That altered ethos would be far different than the antiquated mindset that continues to pervade correctional institutions in this country—the mindset of “captor and caged.” That ethos would embody at least four precepts: (1) hope as an imperative; (2) the viability of renewal; (3) the catharsis that attends personal responsibility and accountability; and (4) the duty and call to respect human dignity, an obligation that encompasses both correctional employees and prisoners. While some might describe this ethos as “new,” it would, in fact, not be new at all but would rather reflect what are considered ancient truths, though truths long ignored behind prison walls.<sup>4</sup>

Naysayers will immediately counter that talk of such transformation occurring in the environs of a prison reflects pollyannaish yearnings disconnected from political realities and betraying a lack of understanding of what life is really like, for prisoners and correctional employees alike, in the hidden confines of prisons. But parsing through these naysayers’ remonstrations reveals that what they are actually saying is that deep-seated cultural norms cannot be changed. And as history, including recent history, confirms, that assertion is utterly false. The memories are still vivid in the minds of many people, for example, of a time when African-Americans had to drink from separate water fountains, when female teachers had to quit their jobs after getting married, and when married women who were able to retain their jobs were forced to resign from them when they became pregnant.

There are some correctional leaders, though not nearly enough, who have publicly espoused the need for, and the feasibility of, what has been aptly termed “culture busting” in prisons.<sup>5</sup> But in the end, the question is not whether culture

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4. To give but one example of the age-old origins of these precepts, they are propounded in the Bible, though sometimes in different nomenclature. As for the first precept—the need for each individual to retain hope—what Oliver Wendell Holmes, Sr. said in secular terms when cautioning, “Beware how you take away *hope* from any human being,” has its own biblical iterations. Oliver Wendell Holmes, Sr., *Valedictory Address to the Medical Graduates at Harvard University (March 10, 1958)*, LVIII BOS. MED. & SURGICAL J. 149, 158 (1858); see, e.g., *Proverbs* 13:12 (“Hope deferred makes the heart sick.”). The second precept regarding the promise of renewal—the affirmation that people can change and, as individuals, be transformed—is also articulated in Scripture, including in the story of the life of Saul, a murderer, who became the Apostle Paul. See *Acts* 9:1-21. The Bible is replete with examples of, and exhortations regarding, the third precept—the redemptive effects of acknowledging and atoning for one’s wrongdoing. See, e.g., *Proverbs* 28:13 (“He who conceals his transgressions will not prosper, but he who confesses and forsakes them will obtain mercy.”); *Matthew* 5:23-25 (“So if you are offering your gift at the altar, and there remember that your brother has something against you, leave your gift there before the altar and go; first be reconciled to your brother, and then come and offer your gift.”). The Bible also extols the value of the fourth precept, expounding on the dignity (and love) with which each individual—even those considered the least of the least—is to be treated. See, e.g., *Luke* 6:31 (“And as you wish that men would do to you, do so to them.”); *Matthew* 25:39-40 (““And when did we see thee sick or in prison and visit thee?” And the King will answer them, ‘Truly, I say to you, as you did it for one of the least of these my brethren, you did it to me.’”).

5. See, e.g., Dora B. Schriro, *Reducing Inmate Litigation: Missouri’s Constituent Services*



busting, in the sense of a transformation in prisons and the people working and living within them, can be realized; the question, the one on which this Article focuses, is how the transformation can be effectuated.

There are innumerable steps—some big, some small—that need to be taken if hope, renewal, personal responsibility, accountability, and a shared commitment to human dignity are to become hallmarks of U.S. prisons, as well as of the larger sentencing and correctional systems of which they are a part. This Article describes five key steps that are integral to this transformative mission:

Step One: Each state and the federal government should establish a maximal limit on the per-capita imprisonment rate that is at least 50% lower than the current national rate and should adopt mechanisms to responsibly implement and enforce the limit.

Step Two: Each state and the federal government should develop and implement a comprehensive plan to ensure that the public is aware of conditions and operations in that jurisdiction's prisons. The plan should include, among other components, the establishment of an independent public entity to monitor, and report publicly on, conditions in the prisons. These monitoring entities should meet the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities" promulgated by the American Bar Association.<sup>6</sup>

Step Three: Each state and the federal government should modify prison policies, practices, and programs to reflect and inculcate a restorative-justice ethos within prisons.

Step Four: Each state and the federal government should adopt and implement policies requiring that each prisoner be assigned a trained and

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*Office Proves Value of Communication*, CORR. TODAY, Aug. 1998, at 74-78. Stratagems are also being developed to create a more positive culture in prisons through strategic planning, strategic management, and staff training, with the National Institute of Corrections playing a leadership role in that endeavor. See, e.g., CAROL FLAHERTY-ZONIS ASSOCS., BUILDING CULTURE STRATEGICALLY: A TEAM APPROACH FOR CORRECTIONS (2007), available at <http://nicic.gov/library/files/021749.pdf>; James Byrne et al., Examining the Impact of Institutional Culture (and Culture Change) on Prison Violence and Disorder: A Review of the Evidence on Both Causes and Solutions, Paper Presented at the 14th World Congress of Criminology (Aug. 11, 2005), available at [http://faculty.uml.edu/jbyrne/44.327/institutional\\_cultureUpdateworldcongressrevised.doc](http://faculty.uml.edu/jbyrne/44.327/institutional_cultureUpdateworldcongressrevised.doc).

6. These requirements are part of a resolution approved by the American Bar Association in 2008 calling on jurisdictions to develop comprehensive plans to bring transparency and accountability into the operations of correctional and detention facilities. AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 9-10 (2008), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_am08104b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf) [hereinafter REPORT TO THE HOUSE OF DELEGATES] (listing the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities").



dedicated mentor at the outset of his or her incarceration.

Step Five: Each state and the federal government should implement procedures to accord prisoners a central role in the development of an individualized reentry plan. This planning process should commence, at the latest, upon the prisoner's incarceration and would encompass his or her involvement in prison programs and other constructive activities.

The taking of these steps would not only catalyze the transformation of prison cultures but also, if the steps were implemented correctly, yield significant cost savings and public-safety and prison-safety benefits. These five pivotal steps, which are capsulized below, are discussed in greater depth in the succeeding parts of this Article.

### I. STEP ONE: CAPPING THE PER-CAPITA IMPRISONMENT RATE

The threshold step to be taken by each state and the federal government to transform prison cultures is to place a firm cap on the per-capita imprisonment rate in the jurisdiction, one which limits the per-capita imprisonment rate to a level far below the inflated national rate of recent years. The imprisonment rate climbed from 94 out of every 100,000 residents in 1968 to 504 per 100,000 in 2008, though the crime rate remained the same.<sup>7</sup>

Many trees have been cut down to produce the writings that explain all too clearly why this nation not only should, but must, escape from what has become an obsessive-compulsive drive to incarcerate, often reflexively, individuals who commit the wrongs denominated as crimes.<sup>8</sup> These reasons for discarding the

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7. James Austin, *Reducing America's Correctional Populations: A Strategic Plan*, 12 JUST. RES. & POL'Y 1, 14 (2010). Considering imprisonment statistics in a bit different light, one out of every 198 U.S. residents was incarcerated in a state or federal prison at the end of 2008. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, at 1, 6 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763>. But the officially reported data on imprisonment rates understate the level of imprisonment in this country because the figures include children. Cf. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5, 24 (2008) [hereinafter ONE IN 100], available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (reporting that when only adults are factored into the calculus, the incarceration rate, a rate that includes confinement in local jails as well as in prisons, exceeds one in every hundred adults).

8. To give a few examples of these writings, see JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION (2007); JAMES AUSTIN & TONY FABELLO, JFA INST., THE DIMINISHING RETURNS OF INCREASED INCARCERATION (2004); LYNN S. BRANHAM, AM. BAR ASS'N, THE USE OF INCARCERATION IN THE UNITED STATES: A LOOK AT THE PRESENT AND THE FUTURE (1992); WILLIAM M. DIMASCIO, SEEKING JUSTICE: CRIME AND PUNISHMENT IN AMERICA (1995); JENNI GAINSBOROUGH & MARC MAUER, SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s (2000); RYAN S. KING ET AL., SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP (2005); ONE IN 100, *supra* note 7; PEW CTR. ON THE STATES, ONE IN 31: THE LONG

view that incarceration is the preferred sanction (or at a minimum, a generally acceptable sanction) range from the humanitarian to the pragmatic.

The ideas, which are grounded in research, for the responsible, safe, and cost-effective decarceration of America have also been widely disseminated—for years. These ideas include, among many others: (1) enhancing the use of civil penalties in lieu of criminal sanctions for some of the aberrant conduct that currently is addressed through criminal justice systems;<sup>9</sup> (2) supplanting incarceration, though certainly not always, with community sanctions, particularly fines, restitution, and community service through which those who have committed crimes are held accountable, in a productive and meaningful way, for the harm they have caused the community and others through their criminal behavior;<sup>10</sup> (3) employing technology, when safety reasons dictate, to more closely monitor certain convicted criminal offenders serving their sentences in the community;<sup>11</sup> (4) substantially decreasing the length of sentences, both incarcerative and those, such as probation, that entail community supervision;<sup>12</sup>

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REACH OF AMERICAN CORRECTIONS (2009) [hereinafter ONE IN 31]; DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME (2007).

9. See AM. BAR ASS'N, HOUSE OF DELEGATES RESOLUTION 102C, at 2, 8 (2010), available at [http://www.abanet.org/leadership/2010/midyear/daily\\_journal/102C.pdf](http://www.abanet.org/leadership/2010/midyear/daily_journal/102C.pdf).

10. See CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, BLUEPRINT FOR COST-EFFECTIVE PRETRIAL DETENTION, SENTENCING, AND CORRECTIONS SYSTEMS 2-4 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations02/107.authcheckdam.pdf> [hereinafter BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS] (calling on states and the federal government to enact comprehensive community corrections acts to facilitate the sanctioning of nonviolent offenders in their communities; to utilize means-based fines and other community sanctions in a way that averts unnecessary incarceration and community supervision; and to implement, through sentencing statutes and sentencing and parole guidelines, the presumption that a community-based penalty is the appropriate penalty for a convicted offender unless the person poses a “substantial danger to the community”).

11. See, e.g., Tony Fabelo, “Technocorrections”: *The Promises, the Uncertain Threats*, 5 SENT'G & CORR.: ISSUES FOR THE 21ST CENTURY 1-2 (2000); Darren Gowen, *Remote Location Monitoring—A Supervision Strategy to Enhance Risk Control*, 65 FED. PROBATION 38 (2001); Cecil E. Greek, *Tracking Probationers in Space and Time: The Convergence of GIS and GPS Systems*, 66 FED. PROBATION 51 (2002); Isaac B. Rosenberg, *Involuntary Endogenous RFID Compliance Monitoring as a Condition of Federal Supervised Release—Chips Ahoy?*, 10 YALE J.L. & TECH. 331, 333-44 (2008).

12. When espousing this policy reform, Al Bronstein, the former director of the National Prison Project, wrote: “Faced with the decision of how to use one prison bed over a three-year period, I would rather use it to sentence 12 burglars to three months each than to sentence one burglar for all 36 months.” Alvin J. Bronstein, *America's Overcrowded Prisons*, 7 GAO J. 29, 30 (1989). The American Bar Association also has urged states and the federal government to reexamine the length of sentences in their jurisdictions, both those served in confinement as well as those served within the community, to ensure that they comport with funding priorities and research findings that generally refute the cost-effectiveness of long sentences. See BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS, *supra* note 10, at 2. Researchers, for example, have



and (5) limiting the grounds for which, and length of time for which, a convicted offender can be sent to prison for violating a condition of probation, parole, or supervised release.<sup>13</sup>

The reason why imprisonment so often remains the top-choice penalty in this country is therefore due not to a lack of better options, but to a lack of political will to pursue those options. It is true that prison officials frequently lament, though often behind the scenes, that their prisons are filled with many people who do not need to be incarcerated and whose presence makes the officials' jobs of running safe and humane prisons so much more difficult, and sometimes impossible.<sup>14</sup> But for an array of reasons, including the fact that the people at the helm of correctional departments are themselves political appointees, prison officials have failed to afford elected officials the political cover they believe they need to take the steps to make imprisonment the penalty of last resort. So the best way, and perhaps the only feasible way, to effectuate a dramatic and sustained reduction in imprisonment in the near future is to establish mechanisms that provide elected officials with this protective sheath.

The cap, for which this Article calls, on the per-capita imprisonment rate in each jurisdiction is one such mechanism. And, I submit, it is the optimal way, if instituted correctly, to redress responsibly and with dispatch the fiscal, public-safety, and humanitarian problems generated by what has become a robotic adherence to the status quo. Departing from what has become the prevalent

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reported that criminal activity peaks when people are in their "late teens and early twenties" and that most individuals desist from committing crimes by the time they turn forty. Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 135 (1998).

13. California's Little Hoover Commission, which instituted a study on the state's parole system after learning that the state had the highest parole-revocation rate in the country, tendered these and other recommendations to revamp the state's customary responses to parole and probation violations. See LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES 1, 75 (2003), available at <http://www.lhc.ca.gov/studies/172/report172.pdf>; see also AUSTIN ET AL., *supra* note 8, at 23; BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS, *supra* note 10, at 2-3.

14. Some correctional officials, however, have been refreshingly outspoken in protesting the overutilization of incarceration and profiling its damaging effects. When speaking on the prevalence of mental illness in prison and jail inmates, Martin Horn, then commissioner of the City of New York's Departments of Correction and Probation, stated:

The presence of the mentally ill in prisons and jails is destabilizing. Keeping the mentally ill safe in jail presents challenges prisons and jails were never intended to face.

If we are serious about reducing the American overuse of imprisonment, we must . . . find better means than incarceration to address the needs of the mentally ill.

Martin F. Horn, Commissioner, Departments of Corrections & Probation, City of N.Y., A Decade of Lessons Learned: The Challenge of Reducing Prisoner Numbers, Presentation to the 10th Annual Meeting of the International Corrections and Prisons Association 4 (Oct. 28, 2008) (transcript available at <http://www.icpa.ca/library>).



norm—often unnecessary and deleterious imprisonment<sup>15</sup>—is also the critical first step to be taken if the goal of fundamentally changing prison cultures in a positive way is to be realized.

But what would that cap be? How should it be implemented, and by when? These are meaty questions, each one of which could be the subject of a discrete article. Set forth below are several key facts and points of which policy makers should be aware as they lay the groundwork for the prompt adoption and implementation of the per-capita imprisonment cap in their jurisdictions.

*A. What Should Be the Cap on the Per-Capita Imprisonment Rate?*

As mentioned earlier, the cap on the per-capita imprisonment rate should be—and, I would argue, must be<sup>16</sup>—at least 50% lower than the current national per-capita imprisonment rate. In other words, the per-capita imprisonment rate in each jurisdiction should be, at most, half of the current national rate.

This figure—50%—has not been drawn out of whole cloth. Rather, the 50% cap on the per-capita imprisonment rate is founded on, and supported by, solid and compelling data—specifically, historical data on imprisonment rates in this country, contemporary statistics on those rates, and national and state crime-rate statistics.<sup>17</sup> In other words, the prescribed cap has been empirically validated.

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15. See *infra* note 16.

16. Even if we were to cast aside humanitarian concerns, maintaining the current imprisonment rate is not sustainable from a resource and public-safety perspective, as many jurisdictions are beginning to recognize. See JUDITH GREENE & MARC MAUER, SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 5-26 (2010), available at [http://www.sentencingproject.org/doc/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/inc_DownscalingPrisons2010.pdf) (recounting steps undertaken in New York that have decreased the size of its prison population by 20% in ten years). In the 2008 fiscal year, states spent a total of over fifty-two billion dollars on corrections, with almost 90% of that money expended on prisons. ONE IN 31, *supra* note 8, at 11. Additionally, the growth in funding allocated to prisons far eclipsed the growth in budgetary outlays (other than for Medicaid) for even the most basic governmental services, such as elementary, secondary, and higher education. *Id.*

Researchers have also concluded that the exponential growth in the use of incarceration, particularly for property and drug offenders, has reached a point where the costs of incarceration far outweigh any public-safety benefits and may, in fact, harm public safety. *Id.* at 18-20. The damaging impact of overincarceration on public safety is due in part to the debilitating and destabilizing effects of incarceration on prisoners, their families, their neighborhoods, and their communities. See KING ET AL., *supra* note 8, at 7-8. Another primary reason for overincarceration's detrimental impact on public safety is that it has led to a diversion of funds from other governmental services, such as drug treatment and programs to increase high school graduation rates, which have been proven to have a greater impact on crime reduction. See *id.* at 8.

17. Although the 50% figure is not drawn from, or its validity dependent on, international practices and statistics, the lessons learned from other countries' sparing use of incarceration provide further confirmation that the 50% cap is appropriate and attainable. For data highlighting the stark contrast between the rate at which the United States incarcerates its populace and the

For example, James Austin, a highly respected criminologist, has tracked and compared national imprisonment and crime rates. As noted earlier, he reported that although the crime rate in the United States in 2008 mirrored the rate in 1968, the imprisonment rate was over five times higher.<sup>18</sup> Furthermore, researchers examining imprisonment and crime statistics at the state level have also concluded that a rise in the level of imprisonment reaches a point of diminishing returns—a point where the costs of imprisonment exceed its benefits in terms of crime reduction.<sup>19</sup> Researchers have also found that an increase in the imprisonment rate can reach a point where it actually augments the level of crime.<sup>20</sup>

It bears emphasizing that the 50% cap on the imprisonment rate in each jurisdiction is not an aspirational goal. Far too timid souls might argue that returning the imprisonment rate to what has been a much lower level historically is a laudable aim that states should formally embrace and strive towards. But that is like saying that a bankrupt or almost bankrupt state should adopt legislation recommending that the state get its fiscal house in order without requiring the concrete steps to allay the fiscal crisis and make fiscal responsibility the operational norm. In short, neither another set of recommendations nor another set of goals that policy makers can promptly and summarily ignore is needed. Rather, each state and the federal government should enact a statutory cap on the imprisonment rate—a codified requirement, not rhetoric.

*B. How Should the Statutory Cap on the Per-Capita Imprisonment Rate Be Implemented, and by When?*

Large-scale changes in the use of finite and expensive resources are not new. For example, women used to always give birth at home or in other nonclinical settings. Americans then moved to a far different norm where women typically gave birth in a hospital and remained hospitalized along with their babies for over a week. Now there has been another paradigmatic shift in the way hospitals are used in the United States for the birthing of children, with most women leaving the hospital within a few days after giving birth. This recent shift, like so many large-scale changes in the utilization of resources, is due to a number of factors. These include, among others, the need to avoid the incursion of unnecessary healthcare costs, an enhanced understanding of postpartum health risks and management of those risks, and the recognition that an extended stay in a hospital can have negative effects on new mothers, their babies, and other family members.

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incarceration rate in the thirty-six European countries with the largest inmate populations, see ONE IN 100, *supra* note 7, at 35.

18. See Austin, *supra* note 7 and accompanying text.

19. See *supra* note 16.

20. See, e.g., Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL'Y 245, 262-63 (2006) (reporting that when the imprisonment rate reaches between 325 to 430 per 100,000 residents in a state, imprisonment fails to reduce crime and may even increase it).



Factors that are in many ways similar to those just highlighted—the need to avoid, wherever possible, the high costs of imprisonment, a better understanding of the nature and level of risks posed by different criminal offenders, and the recognition of the harm imprisonment causes those who are incarcerated, their families, and communities—should likewise propel jurisdictions towards a paradigmatic shift in the use of prison resources, a shift facilitated by enactment of the statutory cap on the imprisonment rate. But while large-scale changes are to be expected, and indeed, welcomed when they culminate in a more efficacious and humane expenditure of resources, it is imperative that the changes be planned and implemented in a way that will realize their objectives and maximize their utility. And this need for planning and attention to implementation details will be equally important as jurisdictions put in place the caps that will enable them to return to significantly lower imprisonment rates.

There are a number of steps that jurisdictions can take to implement this cap safely and responsibly. James Austin has propounded four recommendations that, if adopted, would slice in half the size of the nationwide prison population and the national per-capita imprisonment rate, returning the United States to the imprisonment rate that prevailed in 1988—250 per every 100,000 residents (versus 504 per 100,000 in 2008).<sup>21</sup> These policy changes have already been adopted in some states, though singly and not as a whole: reducing the length of prison sentences; reducing the extent to which individuals who have violated a condition of parole or probation but have not been convicted of a new crime are imprisoned; reducing the length of imprisonment of those probation and parole violators who are sent to prison; and imposing penalties other than imprisonment for “victimless crimes,” such as drug possession.<sup>22</sup>

There are additional or alternative steps that a jurisdiction can take to reduce its prison population significantly without compromising the penological objectives of its criminal-justice system and with due regard to public-safety needs. The American Bar Association, for example, has recommended the taking of twenty discrete steps to make pretrial detention, sentencing, and correctional systems more cost-effective.<sup>23</sup> These steps include, among others, adopting a comprehensive community corrections act that will catalyze the integration of a full range of community sanctions into criminal-justice systems to avert unnecessary (and quite costly) incarceration; repealing mandatory-minimum sentencing laws, which foreclose judges from tailoring sentences based on the gravity of a crime and the offender’s culpability; and establishing a structure to facilitate the application of sentencing reforms to individuals already in prison, including reductions in authorized prison sentences.<sup>24</sup>

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21. See Austin, *supra* note 7, at 14, 26-34.

22. See *id.* at 27-34.

23. BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS, *supra* note 10, at 2-4.

24. *Id.*; see also JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 9-10, 24-34 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (setting forth recommendations about punishment and incarceration that were approved by the ABA’s House of



Apart from the question of how to implement a jurisdiction's statutory cap on the per-capita imprisonment rate is the question of the timetable for coming into compliance with that cap. The timetable will, of course, vary from jurisdiction to jurisdiction, in part because imprisonment rates vary significantly from state to state.<sup>25</sup> But if a jurisdiction's statute placing a cap on the imprisonment rate leaves open the end date by when the cap must be met, the cap will become, in effect, a goal, not a requirement—a goal whose realization will likely be eluded. Likewise, if the end date is too far in the future, the work needed to ensure compliance with the cap will in all probability be forestalled by those wedded to the status quo.

In order to prevent the skirting of the statutory cap, jurisdictions should set a due date for the cap that is realistic for the jurisdiction yet lends a sense of urgency to take the steps needed to implement the cap with dispatch. James Austin has explained how the four, what he has termed “relatively modest,” adjustments discussed earlier<sup>26</sup> will gradually decrease, by 50%, the size of the nation's prison population as a whole within eight years.<sup>27</sup> At a minimum, then, at least most jurisdictions should set a firm deadline of, at the latest, eight years to come into compliance with the statutory cap on the imprisonment rate. And if jurisdictions are willing, as I believe they should be, to consider the range of additional ways<sup>28</sup> beyond those four steps through which the imprisonment rate can be reduced cost-effectively and with due regard for public safety, policy makers should consider the viability of adopting a shorter maximal timeline of five or six years to implement the imprisonment-rate cap.

Whatever the timeframe adopted—whether eight years, five years, or something in between—jurisdictions should identify the mechanisms to be used to help recalibrate more carefully the length of prison sentences and modulate other practices that have contributed to the explosion in the size of prison populations nationwide. An example of one such mechanism would be an existing sentencing guidelines commission or other entity charged with monitoring the impact of various types and lengths of sentences in the jurisdiction, including their cost-effectiveness.

## II. STEP TWO: DEVELOPING AND IMPLEMENTING A COMPREHENSIVE PLAN TO MONITOR, AND REPORT PUBLICLY ON, PRISON CONDITIONS IN THE JURISDICTION

Another integral step to effectuate the transformation of prison cultures is to bring transparency and accountability into prisons and their operations. It is

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Delegates, making them official ABA policy).

25. At the end of 2009, the imprisonment rate for prisoners sentenced to more than one year ranged from a high of 881 per 100,000 residents in Louisiana to a low of 150 per 100,000 residents in Maine. HEATHER C. WEST ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 24 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

26. See *supra* notes 21-22 and accompanying text.

27. See Austin, *supra* note 7, at 12-13, 26-34.

28. See *supra* notes 9-13, 23-24 and accompanying text.

difficult to envision how such a transformative evolution in the ethos that pervades prisons could otherwise occur. When policy makers and the public are largely ignorant of what transpires in prisons, they become complacent—even indifferent—about this hidden world of which they know little or nothing. The stimulus for progressive changes in prison conditions, much less fundamental alterations in cultural norms within prisons, is, quite simply, absent.

Federal and state governments can and should make transparency and accountability hallmarks of their prisons by developing and then implementing in their respective jurisdictions a comprehensive prison transparency and accountability plan.<sup>29</sup> To ensure that this plan is formulated, followed, and periodically refined, each jurisdiction should enact a statute directing that this comprehensive plan be instituted and, at periodic intervals, reviewed and revised to meet the goals of transparency and accountability.

A comprehensive plan to import transparency and accountability into prison operations would be comprised of multiple components. The plan would need, for example, to address the subject of media access to prisons, since the media is one mechanism for transmitting information to the public about what is happening (and not happening) behind prison walls and fences. But whatever the exact contours of the transparency and accountability plan in a particular jurisdiction, one essential ingredient would be a provision for the establishment of an independent public entity to monitor, and report publicly on, conditions in the jurisdiction's prisons.<sup>30</sup>

Core features of this monitoring process have already been identified and

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29. The American Bar Association has urged federal, state, local, and territorial governments to develop such comprehensive plans. The plans would encompass not only prisons, which are the focus of this Article, but also jails, juvenile training schools, juvenile detention centers, and other correctional and detention facilities within criminal and juvenile justice systems. *See* REPORT TO THE HOUSE OF DELEGATES, *supra* note 6.

30. In addition to the American Bar Association, the National Prison Rape Elimination Commission has endorsed creating such independent public entities. *See* REGGIE B. WALTON ET AL., NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 10 (2009), *available at* <http://www.ncjrs.gov/pdffiles1/226680.pdf>. The Commission on Safety and Abuse in America's Prisons has also advocated that states establish independent oversight entities to monitor and report on the conditions in prisons and jails. *See* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT 79-81 (2006), *available at* [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf). This recommendation was the by-product of the Commission's investigation of, and report on, what it found to be unsafe, inhumane, unproductive, and often sordid conditions of confinement in many prisons and jails. *See id.* at 19-61; *see also* JEREMY TRAVIS, TASK FORCE ON TRANSFORMING JUVENILE JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 12, 85-87 (2009), *available at* <http://www.vera.org/download?file=2944/Charting-a-new-course-A-blueprint-for-transforming-juvenile-justice-in-New-York-State.pdf> (recommending "external oversight" of institutional facilities for adjudicated delinquents to redress what the task force found to be "shocking" conditions, including rampant excessive use of force against confined juveniles).



encapsulated in the “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities” promulgated by the American Bar Association.<sup>31</sup> There is no need to replicate the work of the experts in corrections and correctional monitoring that culminated in the recommendations endorsed by the ABA.<sup>32</sup> But because those requirements are not yet well-known and because of the catalytic role that a monitoring entity meeting those requirements can play in rectifying the grave problems that plague our nation’s prisons and stymie fundamental changes in prison cultures, those requirements bear reiterating below:

1. The monitoring entity is independent of the agency operating or utilizing the correctional or detention facility.
2. The monitoring entity is adequately funded and staffed.
3. The head of the monitoring entity is appointed for a fixed term by an elected official, is subject to confirmation by a legislative body, and can be removed only for just cause.
4. Inspection teams have the expertise, training, and requisite number of people to meet the monitoring entity’s purposes.
5. The monitoring entity has the duty to conduct regular inspections of the facility, as well as the authority to examine, and issue reports on, a particular problem at one or more facilities.
6. The monitoring entity is authorized to inspect or examine all aspects of a facility’s operations and conditions including, but not limited to: staff recruitment, training, supervision, and discipline; inmate deaths; medical and mental-health care; use of force; inmate violence; conditions of confinement; inmate disciplinary processes; inmate grievance processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.

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31. See REPORT TO THE HOUSE OF DELEGATES, *supra* note 6.

32. I had the privilege to serve as the chair of the ABA’s Subcommittee on Effective Prison Oversight. The other subcommittee members included: Alvin Bronstein, former director of the National Prison Project and president of the board of directors of Penal Reform International—The Americas; Jamie Fellner, who headed the U.S. program of Human Rights Watch; Stephen Gobbo, who has worked in the New York and Michigan prison systems, as well as in the Federal Bureau of Prisons; Michael Hamden, then executive director of North Carolina Prisoner Legal Services, Inc.; Martin Horn, then commissioner of the City of New York’s Departments of Correction and Probation; J. Michael Quinlan, senior vice president of the Quality Assurance Division of Corrections Corporation of America and the former director of the Federal Bureau of Prisons; and Malcolm Young, who was the executive director of the John Howard Association of Illinois, a nonprofit organization that monitors conditions in adult and juvenile correctional facilities in Illinois.



7. The monitoring entity uses an array of means to gather and substantiate facts, including observations, interviews, surveys, document and record reviews, video and tape recordings, reports, statistics, and performance-based outcome measures.
8. Facility and other governmental officials are authorized and required to cooperate fully and promptly with the monitoring entity.
9. To the greatest extent possible consistent with the monitoring entity's purposes, the monitoring entity works collaboratively and constructively with administrators, legislators, and others to improve the facility's operations and conditions.
10. The monitoring entity has the authority to conduct both scheduled and unannounced inspections of any part or all of the facility at any time. The entity must adopt procedures to ensure that unannounced inspections are conducted in a reasonable manner.
11. The monitoring entity has the authority to obtain and inspect any and all records, including inmate and personnel records, bearing on the facility's operations or conditions.
12. The monitoring entity has the authority to conduct confidential interviews with any person, including line staff and inmates, concerning the facility's operations and conditions; to hold public hearings; to subpoena witnesses and documents; and to require that witnesses testify under oath.
13. Procedures are in place to enable facility administrators, line staff, inmates, and others to transmit information confidentially to the monitoring entity about the facility's operations and conditions.
14. Adequate safeguards are in place to protect individuals who transmit information to the monitoring entity from retaliation and threats of retaliation.
15. Facility administrators are provided the opportunity to review monitoring reports and provide feedback about them to the monitoring entity before their dissemination to the public, but the release of the reports is not subject to approval from outside the monitoring entity.
16. Monitoring reports apply legal requirements, best correctional practices, and other criteria to objectively and accurately review and assess a facility's policies, procedures, programs, and practices; identify systemic problems and the reasons for them; and proffer possible solutions to those problems.

17. Subject to reasonable privacy and security requirements as determined by the monitoring entity, the monitoring entity's reports are public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.

18. Facility administrators are required to respond publicly to monitoring reports; to develop and implement in a timely fashion action plans to rectify problems identified in those reports; and to inform the public semi-annually of their progress in implementing these action plans. The jurisdiction vests an administrative entity with the authority to redress noncompliance with these requirements.

19. The monitoring entity continues to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.

20. The jurisdiction adopts safeguards to ensure that the monitoring entity is meeting its designated purposes, including a requirement that it publish an annual report of its findings and activities that is public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.<sup>33</sup>

The rationales for most of the monitoring prescriptions and protocols set forth above are self-evident. If the monitoring entity were not, for example, independent of the prisons being inspected, its objectivity would be compromised, and the accuracy and completeness of its findings and recommendations would be suspect. The history of corrections is littered with examples of the obfuscation of facts—at times scandalous facts—by non-independent inspectors charged, supposedly, with ferreting out those facts.<sup>34</sup>

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33. REPORT TO THE HOUSE OF DELEGATES, *supra* note 6, at 9-10.

34. A prime example of a non-independent monitoring entity's suppression of facts about the gross mistreatment or neglect of prisoners came to my attention while performing corrections-related work. The inspectors from one such entity had failed to mention in their inspection report, which was considered by the monitoring entity when making decisions about the prison in 2009, that a mentally ill prisoner had starved to death in the prison. (Due to his illness, the prisoner apparently had believed that his food was being poisoned and had refused to eat.) The report given to those who had the authority to take adverse actions against the prison due to this neglect also failed to discuss systemic problems at the prison that, if remedied, would have averted the inmate's death.

In another instance illustrating the lack of candor and accuracy that can ensue when the monitoring entity is not independent of the prison being monitored, I once overheard an inspector tell an official at the prison being inspected: "The best thing that could happen to this prison is that a bomb fall on it." However, the report which recounted the purported findings of the inspection of this prison failed to mention the grave problems at the prison, including an endemic problem of prisoners being raped and threatened with rape, that had prompted the inspector's observation.



The monitoring framework envisioned by the ABA requirements is, for this country, bold and visionary. The independent monitoring entity would have a statutory duty to regularly inspect each prison, as well as certain other correctional and detention facilities in the jurisdiction. To guard against the concealment of negative facts about conditions within a prison, the monitoring entity would have the authority to conduct inspections without any advance notice and at any time, day or night.<sup>35</sup> The monitoring entity would have the authority to inspect all facets of the facility's operations and conditions, as well as conduct confidential interviews with line staff and prisoners, to unearth serious problems of which the prison administrators are unaware, are inured to, or have tried to mask.<sup>36</sup> The reports about a particular prison would be disseminated to the public, accessible through the Internet, and distributed to the media, the legislature, and the top elected official in the jurisdiction, either the governor or President.<sup>37</sup> Also, prison administrators could not just blithely ignore the report of a monitoring entity. The statute establishing this monitoring structure would require the administrators to draft and implement, in a timely fashion, "action plans" to resolve problems identified in a monitoring report.<sup>38</sup> In addition, the administrators would have to report twice a year on the progress of their implementation efforts.<sup>39</sup>

While integrating the external monitoring of prisons into the fabric of corrections would be a significant advancement in the United States, it would be erroneous to perceive or portray this monitoring as some kind of radical intervention that would inhibit prison officials from performing their jobs. To the contrary, these kinds of inspections by an independent body are the custom in Great Britain, where the British Prison Inspectorate has uninhibited access to the country's prisons.<sup>40</sup> In addition, the European Committee for the Prevention of Torture (CPT) conducts independent inspections of prisons in the forty-seven countries that are members of the Council of Europe.<sup>41</sup> Adopting the proposal for external monitoring by the ABA would therefore not be a revolutionary development, but would simply reflect the recognition that it is time for the United States to catch up with much of the rest of the civilized world.

### III. STEP THREE: INTEGRATING A RESTORATIVE-JUSTICE ETHOS INTO PRISONS

True transformation requires not just changes on the outside, but changes on the inside. What this means in the prison setting is that external improvements in prison conditions, however important or imperative those improvements may

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35. REPORT TO THE HOUSE OF DELEGATES, *supra* note 6, at 9.

36. *See id.* at 9-10.

37. *Id.* at 10.

38. *Id.*

39. *Id.*

40. *See* Michele Deitch, *Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience*, in THE STATE OF CORRECTIONS: PROCEEDINGS, AMERICAN CORRECTIONAL ASSOCIATION ANNUAL CONFERENCES 2005, at 141, 145-47 (2006).

41. *Id.* at 147-48.

be, will not alone effect a transformation in prison cultures. Cramming too many prisoners in spaces too small to house them humanely or guard their safety and the safety of correctional staff can be halted. Dank cells infested with insects and rodents can be demolished and replaced by clean rooms with a natural-light source. Prisoners who sit idly in their cells hour after hour, day after day, and year after year can be put to work. Palpable deficiencies in the delivery of medical services to prisoners can be corrected so that sick inmates receive needed medical care. And other steps can be taken to solve the grave problems in prison conditions of which the public is still largely unaware. Yet even with these necessary changes, prisons, below the surface, will remain the same—places where prisoners are, at best, viewed as inferior human beings and, at worst, as subhuman; places where incarcerated individuals cannot, through positive deeds, make amends for their crimes; and places where the future holds little promise for prisoners.

One of the principal ways in which to effect this deeper change in the people who live and work in prisons is to inculcate the ethos of restorative justice into prison operations, processes, and programs. Restorative justice has age-old, including biblical, roots.<sup>42</sup> Restorative justice is grounded on a number of precepts. One is that those who commit crimes should be held accountable, in a meaningful way, for the harm their crimes have caused.<sup>43</sup> Accountability occurs when these individuals truly comprehend the impact of their crimes on their victims and others, when they assume the responsibility to repair, to the extent possible, the harm caused by their criminal conduct, and when they address the underlying reasons for their aberrant conduct.<sup>44</sup>

Restorative justice also has other key tenets. Examples include:

1. The stigma that attends the commission of a crime can be removed.<sup>45</sup>
2. Offenders should be provided opportunities to express and experience contrition for their crimes.<sup>46</sup>

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42. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 515-16 (2007).

43. MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION*, at xxx-xxxii (2001) [hereinafter *HANDBOOK OF VICTIM OFFENDER MEDIATION*].

44. See MARK UMBREIT & MARILYN PETERSON ARMOUR, *RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE* 8 (Jennifer Perillo & Peter Rocheleau eds., 2011) [hereinafter *RESTORATIVE JUSTICE DIALOGUE*].

45. Howard Zehr, *Retributive Justice, Restorative Justice*, 4 NEW PERSP. ON CRIME & JUST. app. (1985).

46. *Id.* At the time of sentencing, offenders are often afforded the opportunity to address the court. See, e.g., FED. R. CRIM. P. 32(i)(4)(A)(ii) (directing courts, before a sentence is imposed, to permit a defendant to speak to the court or present information that might mitigate the sentence). But this abbreviated, and sometimes perfunctory, opportunity to speak to a judge does not, for many reasons, effectuate the aims of restorative justice. The victim, for example, may not even be in the courtroom at the time the defendant exercises what is known as the right of allocution. More fundamentally, the one-sided impartation of information to the judge is neither intended to, nor



3. Victims of crimes should be afforded opportunities for healing through facilitated communications with offenders.<sup>47</sup>

4. The primary focus of the justice system is not on the past—on casting blame for what has been done. The primary focus of the justice system is on the future—on repairing the harm caused by a crime and solving the problems that contributed, and could contribute again, to making the ill-advised decision to commit a crime.<sup>48</sup>

Obviously, restorative aims can be achieved much more readily when individuals remain within the community while being held accountable for their criminal misdeeds. But for those who must be confined in prison, effective structures, processes, and programs should be in place in each prison to make restorative justice a shared and expected norm.

Many different kinds of steps can be taken to reorient the culture and normative values in prisons towards restorative justice. The following are just four examples of multiple programs with a restorative-justice focus that can become common features of all prisons.<sup>49</sup>

The first prototypical restorative-justice program is victim-offender mediation.<sup>50</sup> Victim-offender mediation programs are gradually becoming part of criminal justice systems at the community level and are beginning to appear in a few prisons.<sup>51</sup>

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designed to, promote the healing and other reparative objectives of restorative justice.

47. See DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 31-43 (Ellen S. Boyne & Elizabeth A. Shipp eds., 3d ed. 2010).

48. See Zehr, *supra* note 45, app.

49. For other examples of restorative-justice programs that can be adapted to the prison setting, see generally KAY PRANIS ET AL., *PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY* (2003) (discussing a restorative conferencing modality that also includes community members); MARK S. UMBREIT, U.S. DEP'T OF JUSTICE, *FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS* (2000), available at [http://www.ncjrs.gov/ovc\\_archives/reports/restorative\\_justice/restorative\\_justice\\_ascii\\_pdf/ncj176347.pdf](http://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf) (describing a restorative mechanism in which the victim's and offender's friends and family members participate in mediation sessions).

50. The American Bar Association has endorsed victim-offender mediation programs and called on jurisdictions to incorporate them into their criminal justice systems. See AM. BAR ASS'N, *CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 101B* (1994). The ABA also has delineated thirteen requirements that these programs should meet, including that the participation of victims and offenders in mediation sessions be voluntary. For a list of these requirements, see *American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs*, VICTIM-OFFENDER RECONCILIATION PROGRAM INFO. & RES. CTR., <http://www.vorp.com/articles/abaendors.html> (last visited June 15, 2011). For additional information about victim-offender mediation, see *HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 43; *RESTORATIVE JUSTICE DIALOGUE*, *supra* note 44, at 111-41.

51. While only a few victim-offender mediation programs existed in the country in the 1970s, twenty years later, almost three hundred were in operation. MARK S. UMBREIT ET AL., U.S. DEP'T OF JUSTICE, *NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED*

A victim-offender mediation program affords a victim the opportunity to meet, in the presence of a trained mediator, with the individual who perpetrated a crime against the victim. During the mediation session or sessions, the victim typically asks the offender—in this case, the prisoner—questions about the crime or the offender that may be troubling the victim, and the victim also explains the impact the crime had on him or her. The offender then talks about the crime and the poor choices that contributed to the offender's decision to commit the crime. This discussion often culminates in the offender's expression of remorse for the crime and the harm it has caused.

The last step in the mediation process is the discussion and development of an agreement between the victim and the offender, identifying the steps the offender will take to remedy the harm the crime caused. In the prison setting, devising this agreement will require some creative thinking, in part because most prisoners are impoverished, lacking the means to remunerate the victim for the harm through monetary compensation. But with the assistance of the trained mediator, the victim and prisoner can construct an agreement that satisfies both parties that the prisoner, while confined and perhaps upon release, will take concrete actions to make something good come out of something bad, perhaps even tragic.

The contours of that agreement will vary based on a number of factors, including the victim's needs and the prisoner's circumstances, such as restrictions at the prison that may hinder or preclude the taking of a particular reparative step by the prisoner. The following are but a few examples of agreed-upon steps that a prisoner might take to repair harm caused by his or her criminal wrongdoing and to bring healing to the victim, the prisoner, and others: the prisoner might provide the victim a formal written or verbal apology; might disseminate the apology to others; might report to the victim at specified intervals about progress made in completing actions the prisoner has agreed to take, such as participating in an Alcoholics Anonymous or Narcotics Anonymous program, to diminish the risk that the prisoner will choose to commit a crime in the future; or might meet, along with the victim if he or she so chooses, with first-time offenders or other individuals considered at risk of future criminal or delinquent conduct to discuss the adverse consequences the victim, prisoner, and others have suffered from the ill-advised decision to commit a crime.

Victim-impact panels are a second example of a mechanism that can be

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STATES 3, 5 (2000), available at [http://www.ncjrs.gov/ovc\\_archives/reports/restorative\\_justice/restorative\\_justice\\_ascii\\_pdf/ncj176350.pdf](http://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf). In addition, a few prison systems have established restorative-justice programs within their prisons, with Kay Pranis, the former Restorative Justice Planner for the Minnesota Department of Corrections, playing a leadership role in that endeavor. See Jessica A. Focht-Perlberg, *Two Sides of One Coin—Repairing the Harm and Reducing Recidivism: A Case for Restorative Justice in Reentry in Minnesota and Beyond*, 31 HAMLINE J. PUB. L. & POL'Y 219, 261-62 (2009); Martha Henderson Hurley, *Restorative Practices in Institutional Settings and at Release: Victim Wrap Around Programs*, 73 FED. PROBATION 16, 19 (2009).



employed in each prison to bring restorative justice to the forefront of a prison.<sup>52</sup> A victim-impact panel is comprised of victims of the crime of which a prisoner was convicted. These panel members can impress upon a prisoner the real-life impact of his or her crime. For example, a victim-impact panel comprised of victims of drunk drivers, such as a person maimed in an accident caused by a drunk driver or the family members of someone killed by a drunk driver, can recount to a prisoner incarcerated for a drunk-driving-related crime, such as vehicular homicide, how drunk driving has affected their lives. These panels can be used to complement victim-offender mediation or in lieu of mediation when, for example, a victim is unable or unwilling to participate in the mediative process. One of the benefits of these panels, as is true with victim-offender mediation, is that they humanize victims, making it more difficult for criminal offenders to rationalize their wrongdoing or ignore the harm for which they are responsible.<sup>53</sup>

Prison work programs in which prisoners produce goods and services that benefit the neighborhoods most adversely affected by prisoners' crimes are a third example of restorative-justice programming. Work programs in prisons are not new, although prisons often lack enough jobs to match the number of employable prisoners or, if they are working, to provide many of them anything more than what can charitably be described as make-work.<sup>54</sup> And some of these existing work programs provide direct benefits to people in the outside world. For example, inmates in prisons with canine-training programs train dogs to provide assistance to disabled individuals with whom they later will be paired.<sup>55</sup>

But what is contemplated in this proposal for injecting accountability for one's crime, in a meaningful and productive sense, into the prison milieu is that

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52. See generally VAN NESS & STRONG, *supra* note 47, at 71-76 (providing a general overview of the structuring and beneficial effects of victim-impact panels).

53. Some prisons, including prisons in Minnesota, already utilize victim-impact panels. Focht-Perlberg, *supra* note 51, at 262. For example, the "Bridges to Life" program in Texas is a pre-release program in which participating prisoners meet with surrogate victims two hours a week for twelve weeks. *Id.* at 254-55. During those meetings, a trained volunteer facilitates discussions between the prisoners and the victims that are designed to promote healing, accountability, and remediation of harm by the prisoners. *Id.* at 255. But while the goals of this program are laudable, they are more limited than the goal articulated in this Article of making restorative justice a mainstay of a prison's overall culture. The focus of the Texas program is on preparing prisoners for their return to the community rather than on also transforming prison cultures through the inculcation of restorative-justice norms and values. See *id.* at 254-55.

54. See *supra* note 3 and accompanying text. In *Smith v. Fairman*, 528 F. Supp. 186, 190 (C.D. Ill. 1981), *rev'd*, 690 F.2d 122 (7th Cir. 1982), the district court recited what is considered a classic example of such make-work. When a prisoner was asked to describe his job working on the prison grounds, he said that his work was completed after fifteen minutes and he then pushed dirt back and forth for the rest of the four-hour workday. *Id.* at 190.

55. See generally Nikki S. Currie, A Case Study of Incarcerated Males Participating in a Canine Training Program (2008) (unpublished Ph.D. dissertation, Kansas State University), available at <http://krex.k-state.edu/dspace/bitstream/2097/1028/1/NikkiCurrie2008.pdf>.

work programs would be established to benefit the communities and neighborhoods most ravaged by crime. An example of such a program would be one that produces materials to be used in constructing new houses or refurbishing dilapidated houses in crime-infested neighborhoods marked by urban blight. Another example would combine a horticultural program, in which prisoners plant and harvest fresh produce, with a food-processing program in which prisoners can or otherwise package a portion of the food. The healthy food produced, prepared, and preserved by the prisoners then could be delivered to poor, crime-ridden neighborhoods where fresh fruit and vegetables are often unavailable or unaffordable.

A fourth kind of restorative-justice programming that can be integrated, and in some instances has been integrated,<sup>56</sup> into prisons affords prisoners opportunities to live in faith-based prison units. To avoid Establishment Clause concerns, it is important that only prisoners who want to, and choose to, live in these units do so.<sup>57</sup> In these units in which prisoners may opt to be confined, prisoners constantly examine their lives and actions through a very different lens—from a spiritual or religious perspective.<sup>58</sup>

For some prisoners, living in a faith-based prison unit for a period of time can be not only a way of meeting unmet spiritual needs, but the optimal way to realize the aims of restorative justice. In other words, in order for some prisoners to understand fully the import of their crimes and make amends, to the extent possible, for those crimes, they have found that they need to nurture their faith, understand and experience forgiveness, or atone, in this kind of setting, for their wrongdoing.<sup>59</sup> Consequently, as prison officials and policy makers consider

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56. See generally NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, RESIDENTIAL FAITH-BASED PROGRAMS IN STATE CORRECTIONS, SPECIAL ISSUES IN CORRECTIONS (2005), available at <http://nicic.gov/Library/Files/020820.pdf> (indicating that twenty-one of the fifty-one state and federal correctional departments surveyed reported having, or developing plans for, one or more residential faith-based programs in their prison system).

57. See generally Lynn S. Branham, "The Devil Is in the Details": A Continued Dissection of the Constitutionality of Faith-Based Prison Units, 6 AVE MARIA L. REV. 409 (2008) (assessing the constitutionality of faith-based prison units in light of the Establishment Clause); Lynn S. Branham, "Go and Sin No More": The Constitutionality of Governmentally Funded Faith-Based Prison Units, 37 U. MICH. J.L. REFORM 291 (2004) (addressing the constitutionality of faith-based prison units and prescribing steps to operate them in conformance with the Establishment Clause).

58. The Life Connections Program (LCP) instituted by the Federal Bureau of Prisons is an example of one such faith-based program. Scott D. Camp et al., *An Exploration into Participation in a Faith-Based Prison Program*, 5 CRIMINOLOGY & PUB. POL'Y 529, 530 (2006). Inmates who participate in this eighteen-month residential program can choose a spiritual guide from an array of faiths, including Buddhism, Catholicism, Islam, Judaism, and Protestantism. *Id.* at 530-31. Inmates in the four or five faith groups represented in the LCP program at a particular prison meet together for some portions of the program, engaging in studies from that faith perspective, and work to grow and develop spiritually. *Id.* at 531. The LCP program also brings the differing faith groups together for joint discussions and other activities. *Id.*

59. The comments of one inmate who lived in a faith-based unit while confined in a Texas



programmatic options for the infusion of restorative justice into prison cultures, religious programming should not be excluded from their consideration.

It would be a mistake, though, to assume that the inculcation of a restorative-justice ethos into prisons would be effectuated only through programs. To the contrary, prison officials and other interested parties, including prisoners, would need to take a range of other steps to make restorative justice a prison trademark. To give just three examples of such steps, prison staff first would need to be trained about restorative justice—its goals, how it is realized, the positive effects that it can have on the overall prison environment, and the ways in which staff can and must meet their responsibility to help imbue the prison culture with a commitment to restorative justice. Second, during their orientation into a prison system or a prison, prisoners would need to be educated about restorative justice, including the integral role they will play in making restorative justice part of the fabric of the institution and their own lives. Finally, restorative-justice principles would need to be integrated into prison disciplinary processes so that prisoners become more cognizant of the harm their misconduct inflicts, both on individuals and the prison community as a whole, and can remedy that harm in a constructive way.

#### IV. STEP FOUR: ASSIGNMENT OF MENTORS TO PRISONERS AT THE OUTSET OF THEIR IMPRISONMENT

The fourth transformative step to be undertaken within prisons is to assign a mentor or accountability partner to a prisoner at the very outset of his or her imprisonment. A mentor can play a significant role in helping a prisoner prepare for his or her return to the community. The mentor can, for example, give encouragement to an inmate, providing the psychic boost needed to surmount the external, as well as internal, obstacles to successful reintegration faced upon release.<sup>60</sup> But the assignment of a mentor to a prisoner at the very beginning of the prisoner's confinement can serve another laudable purpose: mitigating the

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prison illustrate how a faith-based program can be a tool for implementing restorative justice. William R. Mattox, Jr., *Prison Program Uses Faith to Transform Lives*, USA TODAY, Mar. 15, 1999, at 17A. According to the prisoner, his participation in the program eventually prompted him to acknowledge his wrongdoing and strive to make amends for it. *Id.* After writing a letter to his former employer asking to be forgiven for lying to and stealing from him, the prisoner and the employer met at the prison and reconciled. *Id.*

60. Researchers have profiled (and lamented) the daunting challenges prisoners face in attempting to reintegrate successfully into their communities after release from prison. See, e.g., JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105-37 (2003); JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 25-36 (2001), available at [http://www.urban.org/uploadedpdf/from\\_prison\\_to\\_home.pdf](http://www.urban.org/uploadedpdf/from_prison_to_home.pdf). These challenges include, among others, employment barriers, untreated and unresolved substance-abuse problems, educational deficits, mental illness, and lack of housing. See *id.* The "prisonization" process, which is described later in this paper, can also stymie the reentry goals of inducing and facilitating the making of law-abiding choices by released prisoners. See *infra* notes 64-65, 78-79 and accompanying text.

debilitating isolation from the outside world that attends incarceration. And the support and encouragement mentors provide prisoners can help to eradicate the hopelessness, despair, and bitterness that permeate prisons today.

The assignment of a mentor to a prisoner at the incipency of his or her incarceration is a common-sense reform and yet . . . not done. It is true, and certainly a welcome development, that more people are beginning to mentor released prisoners, although there are still far fewer mentors than needed.<sup>61</sup> In addition, some people, most often volunteers from churches and other religious groups, are already serving as mentors to at least a fraction of prisoners during some of the time they are incarcerated.<sup>62</sup> But the mentoring of prisoners is still, as a general practice, too little, too late.<sup>63</sup> Most prisoners never have mentors, and those who do are matched with a mentor long after what has been termed “prisonization” has occurred.<sup>64</sup> This prisonization process erodes prisoners’ self-worth, erases their ability to trust others, makes them more willing to exploit others, triggers post-traumatic stress disorder, or has other damaging effects.<sup>65</sup> Combined, these factors make it less likely that prisoners, the prison staff, the public, and the prison culture as a whole will reap the benefits mentors offer to prisoners.

Recognizing the value of mentors is one thing. Integrating them into prison operations such that their presence, work, and recognized utility are embedded in the culture of a prison is quite another. It would be naïve to assume that making mentors a mainstay in prisons would be an easy task. Prison officials

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61. A survey of released prisoners conducted as part of the Serious and Violent Offender Reentry Initiative (SVORI), an undertaking by the federal government to help states reduce the rate with which released prisoners recidivate, found that 60% of them reported that they needed a mentor. Christy A. Visser & Pamela K. Lattimore, *Major Study Examines Prisoners and Their Reentry Needs*, 258 NAT’L INST. JUST. J. 30, 32 (2007). This statistic may understate the need for a mentor because some released inmates may not recognize that need or understand the benefits to be reaped from working with a capable and dedicated mentor.

62. See, e.g., COFFEY CONSULTING, LLC & MATHEMATICA POL’Y RESEARCH, INC., EVALUATION OF THE PRISONER RE-ENTRY INITIATIVE: FINAL REPORT 71 (Mary Grady & Amy C. Coffey eds., 2009), available at [http://wdr.doleta.gov/research/FullText\\_Documents/Evaluation%20of%20the%20Prisoner%20Re-Entry%20Initiative%20-%20Final%20Report.pdf](http://wdr.doleta.gov/research/FullText_Documents/Evaluation%20of%20the%20Prisoner%20Re-Entry%20Initiative%20-%20Final%20Report.pdf) (reporting that the majority of mentors participating in a pre-release-services project—to help prisoners secure jobs upon release and otherwise ease their transition out of prison—came from churches and other faith-based groups).

63. See, e.g., *id.* at 117 (reporting that almost three-fourths of the prisoners participating in a pre-release program with a mentoring component were enrolled in the program within only three months of their release, with almost half of them participating in the program for just one month before release).

64. For a discussion of the adverse effects on prisoners resulting from the prisonization process, see Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 40-46 (Jeremy Travis & Michelle Waul eds., 2003).

65. See *id.*



would have a number of logistical issues, security concerns, and other questions to address and resolve while planning mentoring programs in the jurisdiction's prison system. Examples of these questions include: (1) Who will serve as mentors? (2) How will mentors be recruited? (3) What commitments will be required of individuals in order for them to be eligible to serve as a mentor? For example, how frequently must a mentor have contact with the prisoner? How often must those contacts involve face-to-face interactions? And for what duration of time must a prospective mentor commit to mentoring a particular inmate? (4) How much training and what kind of training will be provided to prospective and existing mentors?<sup>66</sup> (5) How can continuity in mentoring be maintained when situations change? For example, mentors may die or move far away, or prisoners may be transferred to another prison.<sup>67</sup> (6) Should only unpaid volunteers serve as mentors, or should mentors receive some form of compensation for their services?

There is not necessarily one correct answer to the questions posited above. Prison officials therefore can, and should, pilot different ways of structuring mentoring programs to determine the best structure in a particular prison system or prison. In addition, when planning and implementing these mentoring programs, prison administrators can consult with organizations that already provide mentoring services to some prisoners, learning lessons from these organizations about how to maximize the effectiveness of prison mentors.<sup>68</sup> Finally, those establishing mentoring programs in prison, not just for pre-release purposes, but also to transform prison cultures, can turn for advice and assistance to those who have already established mentoring programs for released prisoners.<sup>69</sup>

Inevitably, there will be critics who reject the proposal that a mentor be assigned to each prisoner at the beginning of a prison term as unrealistic, reflecting pie-in-the-sky thinking. Unorthodox ways to help at-risk individuals

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66. In order to be eligible to serve as a mentor, an individual might, for example, be required to receive orientation training before this service begins, as well as supplementary training at periodic intervals afterwards.

67. The value of continuing an existing mentor-inmate relationship and preserving the optimal number of personal contacts between the mentor and the prisoner could, of course, be factored into the decision whether to transfer a prisoner to another prison.

68. Prison Fellowship Ministries, which assigns mentors to prisoners participating in certain faith-based pre-release programs in prisons, is an example of one such organization. *See* BRITTANI TRUSTY & MICHAEL EISENBERG, CRIMINAL JUSTICE POL'Y COUNCIL, INITIAL PROCESS AND OUTCOME EVALUATION OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM IN TDCJ 25 (2003), *available at* [http://www.lbb.state.tx.us/PubSafety\\_CrimJustice/6\\_Links/IFIInitiative.pdf](http://www.lbb.state.tx.us/PubSafety_CrimJustice/6_Links/IFIInitiative.pdf) (noting that continued contact with a mentor after release was associated with lower recidivism rates).

69. *See generally* RENATA COBBS FLETCHER ET AL., PUB./PRIVATE VENTURES, MENTORING FORMER PRISONERS: A GUIDE FOR REENTRY PROGRAMS (2009), *available at* [http://www.ppv.org/ppv/publications/assets/316\\_publication.pdf](http://www.ppv.org/ppv/publications/assets/316_publication.pdf) (outlining needed steps when incorporating mentoring into a reentry program for released prisoners).

make the responsible decisions needed to turn their lives around have often been met with skepticism. Teach for America, a program offering college graduates the chance to teach in poor urban schools for two years, is a quintessential example.<sup>70</sup> Few would have ever predicted at the time the idea for Teach for America was floated in a senior thesis written by a college student in 1989 that within a decade, thousands of college students from across the country would be vying for the opportunity to make a positive difference in these challenging environments.<sup>71</sup>

#### V. STEP FIVE: PRISONERS' INVOLVEMENT IN THE DEVELOPMENT OF REENTRY PLANS WHOSE IMPLEMENTATION COMMENCES UPON INCARCERATION

The fifth pivotal step that will enable jurisdictions to, in a sense, put their prisons of the past, and sometimes sullied past, behind them is particularly consonant with the four precepts outlined at the beginning of this Article. These precepts, which would serve as the underpinnings for a transfiguration in the ethos pervading prisons, include hope as an imperative, the attainability of renewal, the catharsis that attends personal responsibility and accountability, and the duty and call for everyone—correctional employees, prisoners, and others—to respect human dignity.<sup>72</sup>

This fifth step entails, in part, the development of reentry plans to foster prisoners' successful reintegration into the community upon their release from prisons. Timing is a key element of this step. As Jeremy Travis, one of the nation's foremost experts on prisoner reentry, recognized a little over a decade ago, reentry planning should not be deferred until shortly before a prisoner's impending departure from prison or after release from confinement.<sup>73</sup> Instead, reentry planning should commence, at the latest, when imprisonment begins.<sup>74</sup> If implementation of the reentry plan begins at this point, the endeavor to address the problems that contributed to the prisoner's poor choice to commit a crime will stand the greatest chance of success. In addition, the timely implementation of the reentry plan will equip the prisoner to adopt a law-abiding lifestyle earlier, while still in prison and not just upon release.

Another key facet of this fifth vehicle for transformative change is that prisoners would play a central role in the development of their individualized reentry plan. It is this part of the recommendation that will, for at least two

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70. See generally WENDY KOPP, *ONE DAY, ALL CHILDREN . . . : THE UNLIKELY TRIUMPH OF TEACH FOR AMERICA AND WHAT I LEARNED ALONG THE WAY* (2001) (describing the Teach for America program and its genesis).

71. See *id.* at 5-13, 149.

72. See *supra* pp. 704-05 and accompanying footnotes.

73. See Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, 7 SENT'G & CORR.: ISSUES FOR THE 21ST CENTURY 1, 2 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181413.pdf>.

74. Cf. *id.* at 8-9 (proposing that the role of the sentencing judge be expanded to oversee the development and execution of an individualized reentry plan for a person sentenced to prison, beginning at the time of sentencing).



reasons, give some people the most pause. First of all, there is a tendency for people to want to intercede in prisoners' lives and "fix them" so that they do not persist in making the bad choices that culminated in their imprisonment. Whether this proclivity reflects hubris about a person's ability to correct the flaws and failings in other people, genuine benevolence, or its opposite—the dehumanizing view that prisoners are like broken objects to be repaired—the end effect is that prisoners are, for the most part, shunted to the sidelines during the reentry-planning process.

Another hindrance to prisoners' significant involvement in reentry planning are correctional officials, wedded to the status quo, who view the prospect of a prisoner being part of a collective problem-solving process—in this case, part of a reentry-planning team—as threatening. Underlying their wariness, at least in part, is the concern that according prisoners an instrumental role in this kind of decision-making process will empower them.<sup>75</sup> This empowerment, it is feared, will in turn make prisoners less compliant, more difficult to manage, and even belligerent.

What is unsettling about this topsy-turvy thinking is that it has, ironically, helped fuel, rather than curb, the negative attitudes and behaviors in prisoners about which prison officials manifest concern. This close-minded opposition to a new paradigm in the treatment of prisoners has also foreclosed those who work and live in prisons, as well as the public, from reaping the many benefits of such a model. If we begin recognizing that prisoners have a vital role to play in planning, in concert with others, how to revamp their lives, all would benefit.

There are multiple reasons why prisoners should not be considered just a focus of the reentry-planning process, but a primary, not secondary, partner in that process. First, welcoming prisoners into the reentry-planning process and underscoring the crucial role they will play in that process will teach or remind them that while others, both inside and outside prisons, perform important

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75. Over a decade ago, then director of the Missouri Department of Corrections Dora Schriro wrote about the need to depart from the prevailing norm in prisons, in which virtually every facet of a prisoner's life is controlled by prison officials, and vest prisoners with heightened decision-making responsibilities. Dora Schriro, *Correcting Corrections: Missouri's Parallel Universe*, 8 SENT'G & CORR.: ISSUES FOR THE 21ST CENTURY 1 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181414.pdf>. Director Schriro acknowledged that her proposal entailed a transfer of some "power" from prison officials to prisoners, something prison officials traditionally have been loath to do. *Id.* But she underscored that according prisoners opportunities to engage in decision making and problem solving can better prepare them for the decisions they will need to make and problems they will need to surmount upon their release from prison. *See id.* at 3 (describing the "parallel universe" to be created in prisons, mirroring the decision-making responsibilities and accountability that exist in the free world, as a "corrections-based reentry program").

The specific recommendation discussed in this Article—to include a prisoner as a member of his or her reentry-planning team—is consonant with the "parallel universe" for which Director Schriro has advocated. However, the primary impetus for the recommendation is to alter profoundly what life is like within prisons, both for correctional staff and prisoners, rather than just what life is like for prisoners and others upon prisoners' release from prison.

reentry-related functions, the ultimate responsibility for the successful transition into community life rests with the prisoner. This emphasis on personal responsibility will heighten the prospect that reentry plans will meet their objectives—that prisoners will refrain from committing crimes and from the maladaptive thinking patterns and behaviors that often are precursors to criminal conduct. Prisoners will be less prone to engage in the blame game that frequently precedes and helps precipitate criminal conduct: “No one’s given me a fair shake in life, so it’s okay for me to do this” or “I need to commit crimes because I can’t get a job because I can’t read, which is because the public schools I attended were so bad.” Other permutations of such finger-pointing rationalizations abound.

A second reason why prisoners should be part and parcel of the reentry-planning team is that when prisoners work hand-in-hand with others to develop their own reentry plans, rather than having those plans imposed on them as a fait accompli, the significance of different parts of the plans will be more understandable to them. They will, for example, more fully grasp why it is important that they complete and excel in a vocational-education program in the prison. Not only will the program help the prisoner develop marketable job skills and critical life skills, such as a work ethic, but the director of that program can then write letters of recommendation on the prisoner’s behalf. This will increase the possibility that the door to a job outside of prison—a door that otherwise will be difficult to even budge<sup>76</sup>—will open. So when prisoners, through their participation in the construction of their own reentry plan, comprehend the import of each component of the plan and the interrelationship between various parts of the plan, they will be more inclined to embrace the plan and perform their responsibilities under it.

Apart from prisoners’ acceptance of personal responsibility for their successful reentry and the understanding and embracing of reentry plans that are likely to ensue when prisoners help to create them, prisoners’ participation in the development of their reentry plans will enhance their effectiveness for a third quite basic reason: their quality will be enhanced. The simple fact is that reentry plans are designed to assist prisoners in overcoming challenges that, if not surmounted, may lead them to make, once again, the foolhardy choice to commit a crime, whether inside or outside prison. And who better than the prisoner can identify, with the assistance of others,<sup>77</sup> the specific impediments to a law-abiding lifestyle that he or she currently is facing or will face upon release?

A fourth benefit of assigning prisoners a central role in planning for their reentry into a community is that it can help combat the deleterious effects of the prisonization process alluded to earlier.<sup>78</sup> One particularly insidious consequence of this depersonalizing process is that prisoners become accustomed to the tight

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76. Surveys have confirmed a marked reluctance on the part of employers to hire ex-prisoners. SOLOMON ET AL., *supra* note 3, at 13.

77. The reentry-planning process will therefore entail introspection on the prisoner’s part, as well as the reality check and professional expertise that others can contribute to that introspective assessment.

78. See *supra* notes 64-65 and accompanying text.



controls exerted over them in prison and eventually become highly dependent on others to make choices for them.<sup>79</sup> When they later are released from prison, they lack the confidence, resilience, and often even the ability to initiate the most basic steps to adapt to life outside prison, such as applying for a job or seeking housing away from people who were criminal compatriots in the past. Participating in the decision making that attends reentry-planning can prevent this erosion or destruction in decision-making and problem-solving skills that may compromise reentry efforts; this participation in fact can help to develop and fortify these skills.

The discussion thus far of the reasons for integrating prisoners into the reentry-planning process has focused primarily on one outcome: the effectiveness of reentry plans, both in terms of their quality and prisoners' adherence to their terms. But another central question is whether assigning prisoners an instrumental role in reentry-planning is related to the transformation in prison cultures for which there is such a discernible need and for which this Article calls. The answer to that question is, indubitably, yes, which brings us to the fifth value of integrating prisoners into the reentry-planning process. The infusion of the normative value of personal responsibility into the prison culture, as well as the engaging of prisoners on a regular and ongoing basis in proactive problem solving, will signal, as well as help catalyze, a shift in the attitudes of both prisoners and correctional employees. Attitudes will shift from getting by, putting one's time in, keeping the lid on, and keeping one's head down to something that is elusive in prisons today . . . hope.

The transformative power of hope cannot be overstated. It is redemptive, cathartic, healing, and uplifting. It is the antithesis of despair. It has been said, in so many different ways, that when a person loses hope, he or she loses everything. And therein lies the quandary created by imprisonment. An unknown author once observed, "When the world says, 'Give up,' hope whispers, 'Try it one more time.'"<sup>80</sup> But the dominant and deafening message society currently sends prisoners, through what transpires and fails to transpire while they are imprisoned, is: Give up! That is not only a disheartening message, but also a dangerous one. As the novelist Marie Louise de la Ramee (pen-named Ouida) once warned, "Take hope from the heart of man, and you make him a beast of prey."<sup>81</sup>

The challenge, then, is finding the ways to instill hope in the hearts of people whose pasts are often replete with failures and stained by the stigma of criminal wrongdoing, who may be consumed with guilt and remorse for the pain they have caused a victim, family members, and others, who are targets of disdain because of their misdeeds, and whose liberty has been so dramatically curtailed. As mentioned above, vesting prisoners with the responsibility to help identify what

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79. See Haney, *supra* note 64, at 40-41.

80. Simran Khurana, *Quotations About Perseverance: Hope, A Select Collection of Quotations*, ABOUT.COM, <http://quotations.about.com/cs/inspirationquotes/a/Perseverance7.htm> (last visited June 15, 2011).

81. II OUIDA, *A VILLAGE COMMUNE* 61 (1881).

they need to do, and can do, to realize the goal of becoming productive, law-abiding citizens is one step, though not the only step, that will begin to offer them this hope—a hope that they may have lost long ago or perhaps never had. The introduction of restorative justice into the daily lives of prisoners can also be a fount of hope.<sup>82</sup> And there are many other ways, including the content and tenor of daily communications between correctional staff and prisoners, in which the hope prisoners need to brave the inevitable pain and hardship of incarceration can be communicated and nurtured.

The final, though related, reason for treating prisoners as partners in the reentry-planning process is straightforward, but compelling. Treating prisoners not as objects, but as the human beings they are, no matter how despicable their prior actions, will demonstrate an unflagging commitment to human dignity. It is that commitment to human dignity that will, in the end, be the essential underpinning of any endeavor to transform prison cultures. Taking the initiative—and what I believe is the moral path—of treating prisoners with dignity will make it more likely that prisoners, in turn, will treat others, including correctional staff, with dignity. And when the day is reached in this nation's prisons when a critical mass of correctional staff treat prisoners the way the staff would want to be treated if they faced the isolation and debasement that accompany a prison sentence, and when a critical mass of prisoners treat correctional staff the way the prisoners would want to be treated if they faced the hard and dangerous task of working within a prison, the transformation of prison cultures will no longer be an ideal for which few now dare even to hope; it will be a reality.

### CONCLUSION

It may be a well-worn adage, but Albert Einstein correctly observed that insanity is “doing the same thing over and over again and expecting different results.”<sup>83</sup> Yet in prisons throughout the United States, we have, since their incipency, been doing the same thing over and over again, and in recent years, at an accelerated pace. Yes, it is true that many prisons no longer have a dungeon-like appearance . . . to the external eye. Some prisons, or at least parts of them, even look a bit like college campuses, with their manicured lawns, sleeping rooms with doors instead of cells with cage-like metal bars, and classrooms in which at least some prisoners can go to school. If one digs beneath the surface of even these prisons, however, it is soon discovered that they share many commonalities with their more dilapidated counterparts of the past and present. Specifically, they share the problems that contributed to prisoners' errant choices to commit crimes being usually ignored or addressed ineptly by the prisoners and correctional staff. They also share a pervading sense of

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82. See *supra* notes 42-59 and accompanying text. The well-trained mentors for which this Article calls can also give prisoners the encouragement and practical advice from which hope can spring. See *supra* notes 60-71 and accompanying text.

83. Albert Einstein, *Albert Einstein Quotes*, NOTABLE QUOTES, [http://www.notable-quotes.com/e/einstein\\_albert.html](http://www.notable-quotes.com/e/einstein_albert.html) (last visited June 15, 2011).



hopelessness and aimlessness stemming from prisoners' certitude that they cannot put their pasts behind them and that society, in any event, will not allow them to. Finally, they share the feelings of futility or indifference felt by correctional staff convinced that they either cannot or need not assist prisoners, in a meaningful way, to turn their lives around. Prisons still continue to be, in short, places largely marked by depersonalization, degradation, despair, boredom, bitterness, anger, and fear.

They do not have to be. It is the premise of this Article that conditions in prisons can not only be improved, as they have been in some prisons, but that the culture within prisons can be transformed. This Article posits how prisons can become places where the brunt of correctional staff and prisoners (there will always and inevitably be outliers) are instilled with a sense of hope, despite the challenges and hardships that inevitably accompany residence or employment in a prison. How prisons can become places fostering an understanding, shared by correctional staff and prisoners, that with guidance, support, and a lot of hard work, prisoners, like other people, can learn from their mistakes, change their attitudes, refrain from hurtful actions, and help others. How prisons can become places where prisoners assume personal responsibility for their crimes by attempting to remedy, to the extent possible, the harm their crimes have caused. And how prisons can become places marked by a singular message: No matter who you are and what you have done in the past, you will be treated with dignity while you are living (or working) here.

I have no illusions, and I do not profess, that the transformation in prison cultures for which this Article calls would be easy. Fundamental change never is. There is always reticence or resistance on the part of many to initiatives to depart from the status quo. But as President Ronald Reagan once aptly noted, "Status quo, you know, that is Latin for 'the mess we're in.'"<sup>84</sup>

This Article has proffered five recommendations that, if implemented, provide the foundation for a transformation in prison cultures from which society as a whole will benefit. The recommended steps include: (1) adopting a statutory cap in each jurisdiction on the per-capita imprisonment rate—a cap at least 50% lower than the current national rate; (2) developing and implementing a comprehensive plan by each state and the federal government to make prison operations and conditions more transparent and accountable to the public; (3) incorporating restorative-justice principles into prison policies, practices, and programs; (4) assigning each prisoner, upon imprisonment, a trained and dedicated mentor to help shepherd the prisoner successfully through the challenges and traumas of life behind bars; and (5) assigning prisoners an instrumental role in the development and ongoing refinement of their own reentry plans, whose implementation would commence at the very beginning of their confinement. These recommendations, upon close examination, are not radical, but tempered. They are grounded on data, lessons learned from other countries, core human values, and a sprinkling of common sense.<sup>85</sup>

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84. See Reagan Remarks, *supra* note \*.

85. As an example of the latter, the recommendation that each prisoner be assigned a trained

The jurisdictions that choose, wisely, to take the needed steps outlined in this Article will confront a number of questions concerning the details of their implementation. A sign that I once chanced upon serves as a reminder of the importance of such details. The sign read:

“Let’s eat, Grandpa.”

“Let’s eat Grandpa.”

What a difference one small detail—in that case, a comma—can make. But while it behooves us to remember that the devil (or his counterpart) is in the details, I recommend the thoughtful and expeditious implementation by each state and the federal government the five proposals set forth in this Article to transform prison cultures and clean up, for everyone’s sake, “the mess we’re in.”<sup>86</sup>

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and committed mentor at the outset of his or her incarceration comports with the truism that there are few among us who are so stalwart that they don’t need a friend to get through life and its travails.

86. See Reagan Remarks, *supra* note \* and text accompanying note 85.





RENAISSANCE OR RETRENCHMENT: LEGAL  
EDUCATION AT A CROSSROADS

LAUREN CARASIK\*

For the great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic. Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.

John F. Kennedy\*\*

TABLE OF CONTENTS

Introduction ..... 736

I. Critique of Contemporary Legal Education ..... 738

    A. *Brief History* ..... 738

    B. *Monographs* ..... 740

        1. The MacCrate Report ..... 740

        2. The Carnegie Report ..... 741

        3. The Best Practices Report ..... 743

    C. *Student Vitriol* ..... 745

    D. *Evidence of Law Student Distress and Professional Dissatisfaction* ..... 747

    E. *Why All This Discontent?* ..... 748

        1. The Socratic Method ..... 748

        2. Competition/Grades ..... 753

        3. Professional Ideals/Professionalism ..... 758

        4. The Economics: Grim Job Prospects, Rising Tuition, and Crushing Debt ..... 758

    F. *Conclusion* ..... 761

II. Responses ..... 761

    A. *Humanizing/Balance in Legal Education* ..... 761

    B. *Outcome Measures* ..... 763

    C. *Procedural and Structural Changes to Accreditation Standards/Structural Changes to the Academy* ..... 766

III. Suggestions ..... 769

    A. *Allow Flexibility for Schools to Reevaluate Institutional Mission* .. 769

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\*\* President John F. Kennedy, Address at Yale University Commencement (June 11, 1962), available at <http://www.jfklibrary.org/Research/Ready-Reference/Kennedy-Library-Miscellaneous-Information/Yale-University-Commencement-Address.aspx>.



B. <i>Increase Diversity of Faculty, Students, and the Profession</i> . . . . .	771
C. <i>Encourage Student Well-Being Through Self-Awareness and Self-Reflection</i> . . . . .	778
D. <i>Rethink Summative Assessment, Mandatory Grading Curves, and Class Rank</i> . . . . .	780
E. <i>Restructure the Bar Exam</i> . . . . .	782
F. <i>Encourage Curricular/Teaching Innovation</i> . . . . .	785
G. <i>Provide Mentoring</i> . . . . .	788
H. <i>Clinics/Externships/Experiential Education</i> . . . . .	790
I. <i>Professionalism, Ethics, and Morals</i> . . . . .	793
J. <i>Public Interest Work/Access to Justice/Pro Bono</i> . . . . .	797
K. <i>Challenge the Primacy of U.S. News</i> . . . . .	802
L. <i>Revisit the Evaluation of Scholarship and Broaden Its Focus/Reward</i> . . . . .	807
M. <i>Equalize Status of Clinical, LRW, and Tenure Track Faculty</i> . . . . .	809
N. <i>Respond to the Changing Nature of Practice</i> . . . . .	810
O. <i>Impediments</i> . . . . .	814
1. <i>Faculty Resistance</i> . . . . .	814
2. <i>Financial Issues</i> . . . . .	814
P. <i>The Gordian Knot</i> . . . . .	815
Conclusion . . . . .	817

## INTRODUCTION

This is a time of unprecedented opportunity to undertake a comprehensive and unflinching evaluation of the deeply entrenched and inflexible system of legal education, a system that has utterly failed to adapt its pedagogy, culture, and economics to the current and devastating reality facing law students. A confluence of factors has created the current state of affairs, including the publication of two monographs—the MacCrate Report<sup>1</sup> and more recently, the Carnegie Report<sup>2</sup>—decrying the limitations of the dominant pedagogy of legal education and urging educators to reshape its reigning design; a collaborative effort to delineate the best practices in legal education in the Best Practices Report<sup>3</sup> that highlighted the shortcomings of legal education as currently structured; crushing student debt, rising tuition, and dismal employment prospects for law school graduates; vociferous student dissatisfaction with the value of their legal education; a continuing crisis in access to justice; the apparent end of “big law;” and alarming rates of student and lawyer distress. These factors contain

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1. AM. BAR ASS’N, LEGAL EDUCATION & PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

2. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

3. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES], available at [http://law.sc.edu/faculty/stuckey/best\\_practices/best\\_practices-full.pdf](http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf).

thematic cross-currents and send the unmistakable message that it is time to ignite a conversation within the academy and the broader legal community to reassess our mission, vision, and efficacy as legal educators. We must engage in unsparing self-reflection, step back from our entrenched positions and the attendant privilege we have as members of legal academia, and re-imagine a new vision for legal education that serves the interests of our students, the bench and bar, and society, with an overarching aspiration to bolster the bedrock principle of equal justice under law.

This Article synthesizes some of the literature criticizing the current state of legal education with some of the scholarship proposing solutions and argues that whatever review is undertaken must be expansive, with a careful and critical look at how each piece supports the endeavor. None of the ideas discussed below, taken alone, are novel, as scholarship abounds on all of the topics. Considered together, they propound a comprehensive and holistic approach to reform. In essence, my goal is to catalyze a wholesale reconsideration of the very foundation of legal education. Many of the seemingly disparate themes comprise a Gordian Knot and cannot be rectified in isolation. Accordingly, the whole enterprise must be deconstructed, from how we recruit and admit law students to how we license them, because the process supports a self-reinforcing and self-perpetuating system and culture that fails to serve our students and the society in which they will operate as professionals. I hope this engenders a conversation that is unfreighted by and decoupled from history and compels us to step back and critically assess how we can restructure legal education by focusing our sights on the best interests of our students instead of perpetuating the privilege and luxury of legal academia. Given the well-documented emotional and fiscal price that legal education is exacting from our students, it is unconscionable to maintain the status quo. After lamenting the current conditions that law students confront, one commentator noted that “[a]t some point, law professors can no longer disclaim responsibility for the harmful consequences of this enterprise.”<sup>4</sup>

This Article is comprised of three parts. Part I provides the historical backdrop for legal education, briefly critiques the current system, and discusses the impact of those shortcomings on law students. Part II considers a few of the solutions crafted in response to the current crisis facing legal educators. Part III suggests a wide array of reforms aimed at remediating these deficiencies and argues that any real reform must consider and integrate the seemingly disparate but interdependent factors. Piecemeal and incremental reforms will ultimately fail to fully remedy the shortcomings of our current system, although they may provide marginal relief. This section also illuminates the significant impediments to meaningful reform in legal education. Each section contains a truncated discussion of the topics because space constraints preclude a thorough discussion. My intention is not to provide persuasive evidence on each component, but rather to encourage a cumulative discussion that underscores the importance of an

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4. Brian Tamanaha, *Prospective Students Deserve Straightforward Law School Data*, NAT'L JURIST (Sept. 28, 2010, 11:02 AM), <http://www.nationaljurist.com/content/prospective-students-deserve-straightforward-law-school-data>.



ecumenical commitment to holistic and comprehensive reform. In conclusion, the Article argues that while the forces supporting the status quo are powerful and the barriers to change are substantial, the costs of ignoring these problems for law students, practicing lawyers, our venerated legal system, and the greater society are wholly unacceptable.

## I. CRITIQUE OF CONTEMPORARY LEGAL EDUCATION

### A. Brief History

The evolution of law school teaching methodology has been thoroughly discussed and dissected in other literature.<sup>5</sup> Although detailed coverage is not necessary here, a brief overview is warranted, precisely because legal education in the last century has been so tradition-bound and resistant to modernization. As initially structured, legal training relied on the apprentice model or classroom lectures.<sup>6</sup> At the end of the nineteenth century, Christopher Columbus Langdell, the dean at Harvard Law School, radically altered the teaching methodology by introducing and promoting the case method.<sup>7</sup> Designed to teach students "how to think like lawyers,"<sup>8</sup> the case method was premised on the notion of "law as science," an assumption that fueled the notion that the primary skill students needed to master was the application of appellate decisions to the specific facts of individual cases.<sup>9</sup> The dominance of the case method rendered the apprenticeship model obsolete, and as a result, law students had little opportunity to acquire practical skills.<sup>10</sup>

By the 1930s, critics condemned the limitations of the case method on a number of grounds, including its inability to recognize the vagaries of real law practice and the lack of training in practical skills. The "legal realists," among

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5. See, e.g., Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449 (1996).

6. *Id.* at 451-52.

7. See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5 n.7 (2000).

8. See Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 358 (1998).

9. Critics rejected the notion that legal analysis could be reduced to "the collection, synthesis, and analytical comparison of common law cases . . . that could be consistently applied in predicting results and deciding future cases." Bernard K. Freamon, *Action Research for Justice in Newark, New Jersey*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION 167, 169-70 (Jeremy Cooper & Louise G. Trubek eds., 1997).

10. See Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 943-44 (1997).

them Jerome Frank<sup>11</sup> and Karl Llewellyn,<sup>12</sup> believed that the case method's reliance on the dry application of purportedly neutral legal principles, as if scientifically predictable, left students inadequately prepared to practice law in the messy "real world situations" in which actual lawyering unfolded. To remedy this deficiency, Frank was one of the first vocal proponents of clinical instruction.<sup>13</sup> Although others echoed his call for training in practical skills, there was initially little recognition of the value of this methodology in law schools.<sup>14</sup>

During the 1960s and 1970s, some changes on the periphery of legal education mirrored the zeitgeist in the wider culture.<sup>15</sup> Legal clinics, with a focus on justice and skills, began to solidify their place in the legal academy, albeit still on the edges of law school pedagogy. The 1980s ushered in an era in which some clinical faculty experienced heightened dissatisfaction with their marginal role within law school culture and the lack of legitimacy for skills training and argued for fuller integration into the legal academy.<sup>16</sup> Some friction ensued between those agitating for legitimacy and those who worried that the goal of integration subverted the central and compelling role of a justice mission in clinical education, tensions which remain unresolved today.<sup>17</sup> Whether skills should assume primacy over justice is an ongoing debate.<sup>18</sup> The late 1990s witnessed the

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11. See Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1315 (1947) [hereinafter Frank, *A Plea*] (proposing that law school be modified to more closely resemble the medical school model); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

12. Legal realists believed that "legal education should expose students to the dynamic relationship between theory and practice—that good theory is practical, and that good practice is informed by theory." Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1932 (2002).

13. See generally Frank, *A Plea*, *supra* note 11; see also Blaze, *supra* note 10, at 939-42, 952 (discussing the goal of clinics to provide comprehensive lawyering skills).

14. Barry and her colleagues ascribe four main reasons to the legal academy's resistance to a full embrace of clinical education. Barry et al., *supra* note 7, at 8-9. Specifically, law schools bristled at any similarity to a trade school and, as such, rejected the value of apprenticeships; clinics are resource-intensive and do not warrant a large share of hotly contested resources; no consensus supported the notion that any training aside from doctrinal analysis had any educational merit; and the American Bar Association initially did little to encourage the use of clinics. *Id.* These reasons continued to impede the integration of clinics until the late 1950s. See *id.* at 9-10.

15. See Wizner, *supra* note 12, at 1933.

16. Barry et al., *supra* note 7, at 16-17.

17. See generally *id.* (discussing the resistance to augmenting clinical training as part of the law school curriculum).

18. See, e.g., Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 CLINICAL L. REV. 205, 218 (2010) (noting that millennials may not share the commitment to social justice that the founders of clinical education espoused and that clinical faculty must adapt their pedagogy to the needs and preferences of current students: "Today, all students are looking to the clinics to provide them with real-life, practical, and professional skills. There will inherently be more students in our presence who simply do not care about any



chorus of voices calling for meaningful reform growing more insistent and pervasive.<sup>19</sup> Among the arguments advanced was the argument that the responsibility for skills training should not be relegated to the clinics alone.<sup>20</sup>

Contemporary critiques of legal education are no less polemical and continue to condemn its anachronistic leanings. As one commentator noted, “[t]here is so much wrong with legal education today that it is hard to know where to begin.”<sup>21</sup> Other critics have concurred, noting that “the reality is that few law students graduate from law school ready to practice law.”<sup>22</sup> Any conversation and serious self-inventory must address the argument that “there is no way to reform legal education in any meaningful way without giving law students far more experience in the practice of law.”<sup>23</sup> Responses to the demands for greater practical training came in various forms, and three reports in particular carried enough gravitas to engender dialogue and scholarship—both in agreement and dissent—about the recurring critiques of the dominant and unyielding law school teaching orthodoxies: the MacCrate Report,<sup>24</sup> the Carnegie Report,<sup>25</sup> and the Best Practices Report.<sup>26</sup> Although some legal educators are committed to seriously evaluating the arguments and principles identified in these reports, many of the recurring themes still face stiff resistance. In essence, careful review and constructive critiques have engendered incremental advances, but legal education has not changed fundamentally in the last quarter century.

### B. Monographs

1. *The MacCrate Report*.—Responding to widespread reproach about the state of legal education, the ABA assembled a task force charged with investigating how to “narrow the gap” between law school and the practicing bar. The results, entitled the MacCrate Report and issued in 1992, endeavored to identify a taxonomy of the requisite skills and values necessary for the practice of law.<sup>27</sup> The report implored law schools to “narrow the gap” between law graduates and the practicing bar.<sup>28</sup> While emboldening beleaguered advocates of

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underlying social mission which the clinics employ. They want someone to show them what it means to be a lawyer, not just a public interest lawyer.”).

19. See Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 116 (2001).

20. See *id.* at 169 (concluding that the “teaching of fundamental lawyering skills and values to help prepare law graduates for practice” should be embraced throughout the law school curriculum, not isolated in clinics).

21. Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN’S L.J. 93, 93 (2004).

22. Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 595 (2008).

23. *Id.* at 597.

24. MACCRATE REPORT, *supra* note 1.

25. CARNEGIE REPORT, *supra* note 2.

26. BEST PRACTICES, *supra* note 3.

27. See MACCRATE REPORT, *supra* note 1, at 3-8.

28. See *id.* at 138-40 (identifying ten fundamental lawyering skills: problem solving, legal

skills training, the report triggered an avalanche of commentary, some laudatory and some dismissive.<sup>29</sup> The MacCrate Report inspired some incremental reforms and animated conversations that continued for the next fifteen years. Prominent critiques in the commentary included the short shrift paid to problem solving in context and the notable absence of inculcation about values in the curriculum.<sup>30</sup>

The criticisms contained in the report were not new, and they emanated from diverse constituencies: the bench, the bar, accrediting bodies, students, and the public. Owing at least in part to institutional resistance to comprehensive reform, prior curricular changes were ad hoc in nature and continued to generate considerable resistance.

2. *The Carnegie Report*.—Fifteen years later, in 2007, dissatisfied with the legal academy's intransigence, the Carnegie Foundation for the Advancement of Teaching (the "Carnegie Foundation") undertook its own critique, prompted by similar concerns. The Carnegie Foundation embarked on a comprehensive evaluation of the professional education offered to lawyers, compared this training to that provided in other professional training programs, and issued a

analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas).

29. See, e.g., Engler, *supra* note 19; see also Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994). Criticisms include the report's failure to emphasize issues such as the human elements of lawyering and creative problem solving. See Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 595-96 (1994); see also Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 346-47 (1999) (noting that the MacCrate Report paid scant attention to "the more humanistic roles of values, interests, problem prevention, interdisciplinary analysis, creative thinking and self-reflection"). For the report's failure to account for the substantial resources necessary to alter the curriculum as suggested, see John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993), and for its failure to address the values underlying diversity, see Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLIN. L. REV. 349 (1994). For the Report's lack of emphasis on research and writing skills, see Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK L. REV. 245, 261 (1996), and for the Report's failure to incorporate professional values, see Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003).

30. See, e.g., Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245 (1992) ("If our job is to train students to 'think like lawyers,' then we should train them to solve such a problem, because that is the kind of thinking that lawyers must actually do. But—you reply—law schools cannot spend their scarce academic resources teaching students every single skill they will need in law practice—how to bill clients, how to manage an office, how to find the courthouse. True, but problem-solving is not like any of those activities. Problem-solving is the single intellectual skill on which all law practice is based.").



fairly critical report.<sup>31</sup> The Carnegie Report characterized law schools as hybrid institutions of which one progenitor is “the historic community of practitioners, deeply immersed in the common law and carrying on traditions of craft, judgment, and public responsibility.”<sup>32</sup> Providing a countervailing influence is the culture of university research institutions that values scholarly productivity over skills often deemed insufficiently intellectual to warrant serious attention or the allocation of resources.<sup>33</sup> From the inception of modern law schools in the 1870s, legal education has tilted progressively toward its academic identity, relying on the notion that law and legal analysis are scientific undertakings, decipherable through formal knowledge.<sup>34</sup> Distancing themselves from a model pejoratively dismissed as a mere trade school, legal academics have focused increasingly on scholarship and research.<sup>35</sup> A byproduct of this orientation has been considerable contested discourse as to the legal academy’s role in preparing students for the practice of law.<sup>36</sup> Noting this tension, the Carnegie Report endeavored to advance a model that integrates formal knowledge and applied practice by suggesting curricular and pedagogical realignment.<sup>37</sup> Not satisfied with reforms aimed solely at inculcation in doctrine and skills, the report also directed much of its discussion to the development of professional identity as integral to the enterprise of legal education.<sup>38</sup>

While the Carnegie Report identified a number of areas in which legal education is lacking, it acknowledged the significant challenges attendant to the effort to reevaluate and revitalize legal education, making it more relevant to the preparation of practicing lawyers.<sup>39</sup> Past progress toward reform has been spotty and occasionally regressive.<sup>40</sup> For example, coinciding with greater integration

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31. CARNEGIE REPORT, *supra* note 2.

32. *Id.* at 4.

33. *See id.* at 4-5.

34. *See id.* at 5.

35. *See id.* at 7.

36. *See id.* at 8; *see also* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 316 n.5 (1995) (“Law schools seem to be the only professional schools with faculties who see their central function as detached from the preparation of professionals for practice. Nor do professors in those other schools—medicine, engineering, business, architecture—generally view their scholarly work as both more important than, and essentially detached from, the work being performed by practitioners.”).

37. CARNEGIE REPORT, *supra* note 2, at 8-9.

38. *See id.* at 14. The authors explained that

[p]rofessional identity is, in essence, the individual’s answer to questions such as, Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? and What place do ethical-social values have in my core sense of professional identity?

*Id.* at 135.

39. *See generally id.* at 162-84.

40. *See, e.g.,* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal*

for clinical faculty and the broad range of skills and experiences they provide to students was a movement toward hiring doctrinal faculty with less practice experience and more impressive academic credentials, further polarizing the debate over the allocation of resources between skills training and scholarly productivity.<sup>41</sup>

3. *The Best Practices Report*.—Contemporaneous with the publication of the Carnegie Report, members of the clinical community completed the Best Practices Project and issued a Best Practices Report, which endeavored to apply the best practices analysis applied widely in other disciplines to legal education.<sup>42</sup> The Best Practices Project methodically deconstructed the skills and professional ideals necessary for the competent practice of law.<sup>43</sup> This monumental effort set out guiding principles for the best practices in legal education, arguing that law schools must evolve to adapt to the changing legal landscape.<sup>44</sup> The Best Practices Report exhorted law schools to broaden their perspective of the skills necessary for the effective practice of law and lamented that this wide conception of skills is given scant attention in the law school curriculum.<sup>45</sup> The report echoed the recurring refrain that law schools fail to instill in their students a sense of professional commitment to ensure access to justice, both to the nation's poor and to its middle class.<sup>46</sup>

The Best Practices Report also decried a lack of professionalism that has fueled an erosion of public trust and an accompanying loss of lawyers' standing as moral leaders.<sup>47</sup> Not satisfied with limiting its purview to skills and values, the

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*Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 519 (2007) (“[H]istory is littered with failed reform efforts of this type. Many brilliant reforms do not take root because they overlook the crucial role of law school culture in determining their meaning and impact.”).

41. See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 127-28 (2010) (noting that the recent decades have seen an influx of law professors with insufficient practical skills).

42. See BEST PRACTICES, *supra* note 3, at 1-3.

43. See *id.* at 2-4.

44. See *id.* at 13-14.

45. See *id.* at 15. According to the Best Practices Report,

[t]he lawyer of the next century will need to be able to diagnose and analyze problems, to talk to and listen to people, to facilitate conversations, to negotiate effectively, to resolve disputes, to understand and present complex material, to use ever-changing technologies, to plan, to evaluate both economic and emotional components and consequences of human decision-making, and to be creative—to use tried and true methods when they are appropriate, but not to fear new and category-smashing ideas or solutions.

*Id.* (quoting Carrie Menkel-Meadow, *Taking Problem-Solving Pedagogy Seriously: A Response to the Attorney General*, 49 J. LEGAL EDUC. 14, 14 (1999)).

46. *Id.* at 18-19.

47. *Id.* at 20.



report exhorted legal educators to attend to the emotional impact of law school,<sup>48</sup> noting that “too many law school classrooms, especially during the first year, are places where students feel isolated, embarrassed, and humiliated, and their values, opinions, and questions are not valued and may even be ridiculed.”<sup>49</sup> The Best Practices Report resolved that “[i]n order to improve the preparation of law students for practice, law schools should expand their educational goals, improve the competence and professionalism of their graduates, and attend to the well-being of their students.”<sup>50</sup> These debates are not merely academic—some analysts predict that the current recession will prompt prospective employers to place an even higher premium on competencies in skills related to the readiness to practice law upon graduation.<sup>51</sup> Citing increased pressure from law students and other constituencies, the Best Practices Report noted that change is inevitable and argued that effective reform is better enacted from within the academy than imposed externally.<sup>52</sup>

Although these three reports may differ in presentation, several common themes are evident. The reports support longstanding efforts of clinical faculty to “engage[] in a concerted shift to integrate legal practice with doctrinal learning in curricula of engaged clinical legal education.”<sup>53</sup> The reports are further consonant in their position that discussions about pedagogy and competing visions about the nature and structure of legal education must not obscure one critical element of law school mission and purpose—the obligation of lawyers to advance justice, particularly for the poor and dispossessed.<sup>54</sup> This theme is

48. *See id.* at 21-26.

49. *Id.* at 22.

50. *Id.* at 13.

51. *E.g.*, Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010) (concluding “that graduates with practical training will be best situated to succeed in the emerging job market”).

52. *See* BEST PRACTICES, *supra* note 3, at 26-27.

53. *See* Letter from Robert R. Kuehn, President, Clinical Legal Education Association, to Hulett H. Askew, Consultant on Legal Education & Admissions to the Bar, American Bar Association 3 (Oct. 15, 2010), *available at* <http://apps.americanbar.org/legaled/accreditation/Comments%20on%20Foreign%20Program%20Accreditation/CLEA.pdf> (regarding the accreditation of foreign law schools).

54. MACCRATE REPORT, *supra* note 1, at 213. Regarding the second normative goal, “striving to promote justice, fairness, and morality,” the MacCrate Report states that lawyer[s] should be committed to the values of:

2.1 Promoting Justice, Fairness, and Morality in One’s Own Daily Practice, including:

- (a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client;
- (b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society;

widely echoed by other writers as well.<sup>55</sup>

### C. *Student Vitriol*

Students have responded to increasing tuition, staggering debt, and deteriorating job prospects with a firestorm of fury, becoming vocal and more sophisticated in disseminating their discontent.<sup>56</sup> This is facilitated in part by the students' unprecedented ability to communicate with each other in real time. The Internet is a popular forum for student jeremiads declaring that something is rotten in the state of legal education, evincing widespread student dissatisfaction.<sup>57</sup> Student blogs are replete with scathing entries expressing outrage at the law schools they accuse of engaging in unethical behavior through the recruitment and matriculation of law students without full disclosure as to the realistic prospects those students face.<sup>58</sup> While at times the language is so salty

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(c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;

2.2 Contributing to the Profession's Fulfillment of Its Responsibility to Ensure That Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them;

2.3 Contributing to the Profession's Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.

*Id.* (citations omitted). The MacCrate Report further argued that "[l]aw school deans, professors, administrators and staff must not only promote these values [of justice, fairness and morality] by words, but must so conduct themselves as to convey to students that these values are essential ingredients of our profession." *Id.* at 236.

55. *E.g.*, Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1021 (2004) ("[M]ost legal academics have done little to educate themselves, the profession, or the public about access to justice and the strategies necessary to increase it. . . . [W]e are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews."); *see also* John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of "Preservation-Through-Transformation"*, 16 FLA. J. INT'L L. 615, 632 (2004) (noting that "law school fails to produce public spirited and socially responsible lawyers") (quoting GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 971 (3d ed. 1999)).

56. *See* Leslie Kwoh, *Irate Law School Grads Say They Were Misled About Job Prospects*, STAR-LEDGER, Aug. 15, 2010, available at [http://www.nj.com/business/index/ssf/2010/08/irate\\_law\\_school\\_grads\\_say\\_the.html](http://www.nj.com/business/index/ssf/2010/08/irate_law_school_grads_say_the.html); *see also* Debra Cassens Weiss, *Angry Law Grads Beef, Blog and Move On; Tuition Makes \$15K Total in 80s Seem Paltry*, ABA J., Aug. 16, 2010, available at [http://www.abajournal.com/weekly/article/angry\\_law\\_grads\\_beef\\_blog\\_and\\_move\\_on\\_big\\_tuition\\_pales\\_next\\_to\\_15k\\_total\\_i](http://www.abajournal.com/weekly/article/angry_law_grads_beef_blog_and_move_on_big_tuition_pales_next_to_15k_total_i).

57. Because student complaints are sometimes perceived by law school faculty and administrators as constant and unfounded, the sentiments expressed in melodramatic terms can make legitimate concerns easier to dismiss, thereby foreclosing serious attention to the underlying issues.

58. *See, e.g.*, BUT I DID EVERYTHING RIGHT!, <http://butidideverythingrightorsoithought.blogspot.com> (last visited June 9, 2011); FLUSTERCUCKED, <http://flustercucked.blogspot.com> (last



and accusatory as to be off-putting, the underlying sentiment reflects their desperation—they have endured three years of grueling academic demands, foregone income, and mounting debt, all undertaken with the belief that at the light at the end of the tunnel was a respectable profession and a reasonable salary. Instead, they face temporary employment, underemployment in areas such as low-wage contract work or even worse, complete unemployment. Whether these blogs and efforts exert any real pressure on law schools remains to be seen, but current and prospective students make up an important constituency that has seemed to be historically out of the mix of any national conversation about legal education.

Aside from vocalizing generalized lament, students are channeling their despair into other avenues. Several students in Tennessee have organized a non-profit group to demand concrete reforms, including more transparency in how law schools report and disseminate employment data.<sup>59</sup> Another student expressed his despondency about his job prospects by writing to his dean and offering to leave law school in his third year if the law school would refund his poorly invested tuition.<sup>60</sup> A third disgruntled student named his alma mater in his bankruptcy case and issued requests for admissions asking his law school to “[a]dmit that your business knew or should have known that [the p]laintiff would be in no position to repay those loans.”<sup>61</sup> Modern technology includes not just blogs, but other multimedia outlets such as YouTube videos, often evincing humorous but poignant discontent.<sup>62</sup> While the public expressions of outrage may only represent a minority view of the most disaffected students and are not always written diplomatically, legal educators would do well to heed the opinions

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visited June 9, 2011); LAWYERS AGAINST THE LAW SCHOOL SCAM, <http://lawschoolscam.blogspot.com> (last visited June 9, 2011); SCAMMED HARD!, <http://scammedhard.blogspot.com> (last visited June 9, 2011); TALES OF THE FOURTH-TIER NOTHING, <http://poetryforpants.blogspot.com> (last visited June 9, 2011); THIRD TIER REALITY, <http://thirdtierreality.blogspot.com> (last visited July 3, 2011).

59. See LAW SCHOOL TRANSPARENCY, <http://www.lawschooltransparency.com> (last visited June 9, 2011). Law School Transparency (LST) describes itself as “a Tennessee non-profit dedicated to encouraging and facilitating the transparent flow of law school employment information.” *Id.* Founded by two Vanderbilt University Law School students in 2009, LST and its administrators operate independently of any legal institutions, legal employers, or academic reports related to the legal market. *Id.*

60. *Open Letter to Interim Dean Brown*, EAGLEIONLINE (Oct. 15, 2010), <http://eagleionline.com/2010/10/15/open-letter-to-interim-dean-brown>.

61. Elie Mystal, *Student v. School: Charlotte School of Law Sued by Student Seeking Admissions for Bankruptcy Proceeding*, ABOVE THE LAW (July 22, 2010, 10:09 AM), <http://abovethelaw.com/2010/07/student-v-school-charlotte-school-of-law-sued-by-student-seeking-admissions-for-bankruptcy-proceeding>.

62. See, e.g., *Not Sure If This Is Funny or Sad: “So You Want to Go to Law School,”* IDEALAWG (Oct. 18, 2010, 8:36 PM), <http://westallen.typepad.com/idealawg/2010/10/not-sure-if-this-is-funny-or-sad.html>.

expressed. After all, many of these students paid upwards of \$120,000,<sup>63</sup> in addition to fees, books, living expenses, and foregone income, and they are understandably dismayed.

*D. Evidence of Law Student Distress and Professional Dissatisfaction*

Compounding complaints about the value of the skills imparted in law school and the dismal economic outlook for students is the evidence documenting the toll law school exacts from its students. The literature is rife with articles deploring the prevalence and severity of law student distress,<sup>64</sup> which manifests in a variety of maladaptive responses. Studies document elevated rates of depression, anxiety, alcoholism, suicide, and professional dissatisfaction among law school students.<sup>65</sup> These alarming statistics are compared to the indicia of well-being prior to starting law school, indexed against other graduate school students, and followed over the course of law school.<sup>66</sup> The reported distress does

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63. I note that this figure does not account for merit aid offered to some students, nor to the lower tuition typically associated with public law schools.

64. See, e.g., Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005) [hereinafter Krieger, *Inseparability*]; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002); Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 J. LEGAL WRITING INST. 229 (2002); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883 (2007); see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 79 (2002) ("Unfortunately psychological distress, dissatisfaction, and substance abuse that begin in law school follow many graduates into practice."); Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 538 (1998) (arguing that law students do not fare well when they are required to sacrifice personal values on the "altar of rationalism"); Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 36 (2000) ("Although the psychological profile of entering law school students matches that of the general public, an estimated twenty to forty percent leave with some psychological dysfunction including depression, substance abuse, and various stress related disorders."); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261, 283 (2004) ("[V]arious problems reported in the legal profession, such as depression, excessive commercialism and image-consciousness, and lack of ethical and moral behavior, may have significant roots in the law-school experience.").

65. See Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 358 (2009) ("In a country where the depression rate is ten times higher today than it was in 1960, lawyers sit at the unenviable zenith of depressed professionals." (internal citation omitted)).

66. *Id.* at 366-67.



not drop off after the first year, when one might reasonably write off the statistics as reflecting the process of adjusting to law school.<sup>67</sup> In response to this troubling trend, law schools have taken limited steps to address the problem, primarily by referring students to on-campus counseling services.<sup>68</sup> However, most of these measures are aimed at students experiencing clinically significant, self-reported distress, and these programs are often not adequately resourced to provide sustained assistance to the majority of students. Perhaps most disturbing, these programs serve only to relieve distress *ex post facto* instead of identifying and ameliorating the underlying factors before they take their toll on students.

Student distress is attributed to a variety of factors ranging from the unrelenting workload and the constant academic pressure fostered by grading curves to the manner in which law school arrests students' moral development.<sup>69</sup> These explanations need not be mutually exclusive, and a synergy among the factors impacts each student differently.<sup>70</sup> The most frequently suspected contributors to student distress are outlined below.<sup>71</sup>

### *E. Why All This Discontent?*

1. *The Socratic Method.*—One recurring theme proffered to explain law student distress is that disaffection is endemic to the nature of the first year curriculum. Socratic teaching, law school's "signature pedagogy," has been widely deconstructed. Some argue that it is by its very nature damaging,<sup>72</sup> while

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67. *Id.* at 367.

68. *Id.* at 361. Many, if not most, law student insurance programs have limited coverage outside of the institution, and if they do provide coverage, it likely requires a contribution from already overtaxed student financial resources. It is conceivable that some faculty do not take the data about law student distress seriously, as they survived law school without undue harm.

69. Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115, 118-19 (2004).

70. Of particular concern is that the negative impact of law school seems to be exacerbated for students of color and women. See LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 76 (1997) ("If law school is 'boot camp' to train recruits for equally ruthless law firms, then the success of this institution is brilliant. Silence makes sense, difference has no place, and domination and alienation are the point. Alternatively, if law school is an attempt to engage and educate diverse students democratically and critically about the practices and possibilities of law for all people, then the failure of the institution is alarming. In the meantime, the price borne by women across colors is far too high and their critique far too powerful to dismiss."). See generally *infra* Part III.C.

71. One analyst attributes distress to "the overwhelming workload, intimidating classroom dynamics, excessive competition, astronomical debt, personal isolation, lack of feedback, and the nearly exclusive emphasis on linear, logical, doctrinal analysis." Lynn C. Herndon, *Help You, Help Me: Why Law Students Need Peer Teaching*, 78 UMKC L. REV. 809, 810 (2010) (quoting Hess, *supra* note 64, at 76).

72. Some commentators are particularly concerned about the impact of the Socratic method on women and students of color. E.g., Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*,

others posit that its utility and potential to inflict harm is dictated by the skill and temperament of the professor employing the method.<sup>73</sup> As noted earlier, the Carnegie Report opined that law schools are reasonably effective in this “first apprenticeship.”<sup>74</sup> Suggestions as to how to modify the methodology vary as widely as assessments of its efficacy. One school of thought favors keeping Socratic teaching intact as the best way to prepare law students for the rigors of practice.<sup>75</sup> Others suggest that this methodology should be modified after the first year, when repetition of the style in each subsequent doctrinal class can be mind-numbing and begins to generate diminishing returns.<sup>76</sup> Still others contend that irrespective of its suitability, allowing this one-dimensional methodology to dominate the entire first year eclipses other learning opportunities, as it is well-suited to only a narrow range of learning styles.<sup>77</sup> Proponents of a modified approach suggest that the first year is the prime time to integrate other competencies such as training in ethics, professionalism, and practical skills beyond the traditional first year writing curriculum.<sup>78</sup> Waiting until later may present a missed opportunity and even do irreversible damage. Despite the diversity of opinions regarding the Socratic method, it seems unlikely to be jettisoned in the foreseeable future. Within this framework, however, there is ample room to integrate strategies to minimize its negative impact<sup>79</sup> and

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85 U. DET. MERCY L. REV. 293, 301 (2008) (“If women and minorities do not benefit from the pure-Socratic approach, we ought to ask ourselves whether professors are ironically perpetuating a subtle form of discrimination by their insistence upon a purely Socratic classroom.”).

73. Ruth V. McGregor, *Response to Bang Goes the Theory—Debunking Traditional Legal Education*, 3 PHOENIX L. REV. 343, 344-45 (2010) (“There is no question in my mind that the effectiveness of the Socratic method does depend to a very considerable extent upon a particular teacher’s ability to help students make the necessary connections between what they are learning, the cases they read, and what they need to know to analyze actual problems in the real world.”).

74. CARNEGIE REPORT, *supra* note 2, at 21-24. This sentiment is echoed by some law students—even those who report dissatisfaction with or distress caused by the law school experience—who believe that the method effectively trains students to “think like a lawyer.”

75. Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C. L. REV. 667, 677 (2005) (“Unfortunately, today’s [s]oft law schools do not prepare their graduates for . . . reality. In most law schools, performance is optional. While the practice of law has been getting [h]arder, law schools have been getting [s]ofter.”).

76. *See id.* at 677-78.

77. Kristin B. Gerdy, *Making the Connection: Learning Style Theory and the Legal Research Curriculum*, 19 LEGAL REFERENCE SERVS. Q. 71, 78 (2001) (“The majority of legal instruction is oriented toward verbal learners.”).

78. *See generally* Madison, *supra* note 72.

79. *See, e.g.,* Marcia Canavan, *Using Literature to Teach Legal Writing*, 23 QUINNIPIAC L. REV. 1, 15-21 (2004) (discussing the use of storytelling techniques to teach legal writing); Deleso Alford Washington, *Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of “Cultural Competency,”* 72 ALB. L. REV. 961, 966 (2009) (advocating for “the use of storytelling and narrative analysis in legal and medical educational settings as a viable approach to enhance learning as well as benefit ultimate professional interactions”); *see generally*



complement the skills imparted. Given the intensity of opinion about the Socratic method and its centrality to law school pedagogy, a more detailed discussion of the varied schools of thought is warranted.

Arguably, the Socratic method exerts too much pressure on students, who are on the hook to answer a series of questions posed by an infinitely more skilled professor who is adept at “hiding the ball” and continues to press for answers when the student has long since exhausted his ability to argue. Closely related to the unrelenting pressure is the perceived humiliation of “getting it wrong” in front of a large classroom brimming with one’s peers.<sup>80</sup> This method is utilized even early on in the first year, when students cannot reasonably be expected to have mastered the cognitive dexterity necessary to engage in the rigors of Socratic banter.<sup>81</sup> Admittedly, lawyering may require thinking on one’s feet, under high-pressure situations, but it is not likely to demand the mastery of large quantities of new material each day, day after day, in class after class. Moreover, real life cases are animated by the authentic clients that provide sufficient details to impassion advocates (or at least their motivation for a paycheck), and the hours of preparation necessary for an appearance on behalf of a client are not analogous to the voluminous nightly reading assignments law students slog through, often exacting a considerable toll on family, friends, and a sense of healthy balance in their lives. I am not suggesting that law schools should infantilize or coddle students, that hard work is inherently bad, or that the workload should be reduced in a way that prevents rigorous preparation. Instead, educators ought to be selective and intentional about how they teach and what they assign and assure themselves through critical review that the methods employed are reasonably calculated to serve those ends.

The Socratic method is also impugned because as employed by some professors, it requires students to separate their morals from their professional identity as a lawyer.<sup>82</sup> Analysis of the cases requires students to focus on a sanitized and dispassionate presentation of facts (disembodied from the people who lived those conflicts and devoid of the social, historical and political context in which the issue arose) and apply purportedly neutral legal concepts to those facts. As a result of the forced impartiality and decontextualized facts, students must disassociate themselves from their moral reactions to answer with

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Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989) (arguing in favor of storytelling in law).

80. See Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267, 285 (2007) (noting that “there is ample evidence that a large number of students have found the Socratic method, at least in the way it was conducted in their classes, to be both humiliating and terrorizing”).

81. Presumably, it takes much repetition to impart these skills; thus, the same methodology is repeated in different substantive areas throughout three years of law school.

82. Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 73 (2003) (observing that law school embraces a “curriculum [that] is designed to neutralize . . . passion by imposing a rigor of thought that divorces law students from their feelings and morality.”).

imperturbable composure.<sup>83</sup> This antiseptic recitation of the facts, repeated ad nauseum in each case across substantive areas, can train the mind to disregard the rich tapestry of circumstances that makes each case compelling and unique. For some students, the divorce of their moral identity from the positions they must argue is profoundly alienating.<sup>84</sup> Related to the personal morality issue, the casebook method is also targeted for criticism because its decontextualized facts ignore the broader societal implications of individual cases.<sup>85</sup> Moreover, many law students entered law school with idealistic notions about advancing social and economic justice, yet our system of ethics instructs lawyers that the broader social implications of legal work are subverted by the goals of individual representation. The repeated focus on just one client rather than the lofty ideals of systemic change can be disappointing—especially when the outcome in a particular case is adverse to a larger group of disenfranchised people—since our system privileges the absolute right of clients to dictate the goals of representation, absent ethical conflicts. Despite the very real cost of this system, students are not often invited to participate in a broader social critique about society's preference for the glorification of individual autonomy over a collectivist ethos, or even taught that the system reflects those priorities.<sup>86</sup>

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83. CARNEGIE REPORT, *supra* note 2, at 139 (“[T]he curricular emphasis on analysis and technical competence at the expense of human connection, social context, and social consequences is reinforced by the broader culture in most law schools.”).

84. A brief discussion of the issue of morality may illuminate why the Socratic method alienates some students more than others. A gender-based critique of morality was articulated by Carol Gilligan, whose pioneering work on gender difference is both seminal and oft-criticized. *See generally* Erika Rackley, *From Arachne to Charlotte: An Imaginative Revisiting of Gilligan's in a Different Voice*, 13 WM. & MARY J. WOMEN & L. 751 (2007). Gilligan argued that women operate on a different moral paradigm than men. After her initial reception as a groundbreaking feminist, Gilligan came under attack. Critics chastised her for essentializing women's voices and argued that her approach privileged those who conform to the stereotype while marginalizing those outside it. Similarly, they argued that her analysis implicitly elevated the female voice as morally superior to the male voice and that her theory reduced morality to an overly simplistic, decontextualized duality. *See id.* at 752-53. Although Gilligan's work has been repudiated by some subsequent feminists as ultimately having a retrograde impact, certain threads of her analysis—namely, that people approach morality differently, between and within cultures—are compelling. *See id.* at 753-56. Removing the inflammatory gender labels, Gilligan has provided useful insights—that the amoral, analytical thinking required of law students is palatable to some and distressing to others. Critiques of Gilligan's gender theories aside, her identification of different moral compasses, and the inherent tension they create, can be instructive in looking at the law school paradigm. *See generally id.*

85. Karen H. Rothenberg, *Recalibrating the Moral Compass: Expanding “Thinking Like a Lawyer” into “Thinking Like a Leader,”* 40 U. TOL. L. REV. 411, 412 (2009) (“[L]aw schools focus too heavily on teaching skills for legal analysis while neglecting students' training regarding the ‘social consequences or ethical aspects’ of that legal analysis.” (citing CARNEGIE REPORT, *supra* note 2, at 187)).

86. Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60



Finally, presenting cases with predigested facts, devoid of the emotion that typically swirls around legal disputes, forces students to divert their attention from the emotional aspects of lawyering. While attorneys must be trained to analyze cases dispassionately, avoiding the emotional features of cases can be detrimental to students', lawyers', and clients' well-being.<sup>87</sup>

Not all educators agree that the casebook method has limitations, and some argue that the Socratic method has been unfairly maligned.<sup>88</sup> It is true that as applied currently, Socratic teaching bears little resemblance to the corrosive and imperious manner employed by Professor Kingsfield.<sup>89</sup> Proponents posit that further deviation from the already eviscerated application of this method leaves students woefully unprepared for the rigors of practice<sup>90</sup> and that the more humanistic application of the Socratic method has served only to increase the gap between legal education and the practice of law.<sup>91</sup> These concerns are

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VAND. L. REV. 609, 612-15 (2007).

87. See Rhonda V. Magee, *Legal Education and the Formation of Professional Identity: A Critical Spirituo-Humanistic—"Humanity Consciousness"—Perspective*, 31 N.Y.U. REV. L. & SOC. CHANGE 467, 476 (2007) ("We should talk about the spiritual and emotional implications of what we study, what we do, and how we interact with one another, so as to encourage and to model an approach to legal education and practice that brings the whole person into the room."); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 120 (2006) ("A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to separate spheres of human existence; the sphere of law admits only of reason; and vigilant policing is required to keep emotion from creeping in where it does not belong."); Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465, 474 (2010) ("[E]motional issues confronting lawyers in 'real' practice should not be deferred until students' second or third year of law school. Those issues are an essential part of practical skills and professional identity development.").

88. See, e.g., Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 955-56 (2005); see also Lloyd, *supra* note 75, at 667 (arguing that "softening" of the law school curriculum and weakening academic rigor has resulted in law schools "doing a poor job" of training future lawyers). These arguments reinforce the assumption that lawyering is a zero-sum game and that zealous advocacy must somehow be premised on combative interactions. This group further argues that other reforms have "softened" law school, such as the "increasing reliance on student evaluations as part of the tenure process," which offers professors an incentive for easy grading and "spoon-feeding" information to increase student evaluations. See Christine Pedigo Bartholomew & Johanna Oreskovic, *Normalizing Trepidation and Anxiety*, 48 DUQ. L. REV. 349, 355-56 (2010).

89. Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869, 895 (2006) ("So anathema is the Socratic method that many law schools now distance themselves from the historical image of law school and advertise themselves as 'kinder and gentler,' than the traditional law school where Professor Kingsfield, the archetypal law professor in *The Paper Chase*, roams the halls.").

90. See Lloyd, *supra* note 75, at 677.

91. See Bartholomew & Oreskovic, *supra* note 88, at 355 ("The slow decline of the Socratic

undoubtedly genuine and well-intentioned, but as the Best Practices Report points out, “[l]aw professors not only have no incentive to change their teaching methods, they have no incentive to change’ at all.”<sup>92</sup>

2. *Competition/Grades*.—The grading system employed by the vast majority of law schools, and the inherent competition it engenders, is another frequently cited source of distress for students.<sup>93</sup> The first year’s reliance on high-stakes, end of semester exams typically provides only summative assessment, a system that is often in stark contrast to students’ experience in their undergraduate institutions. This grading system endures despite criticism from current students and practitioners.<sup>94</sup> Although some professors have implemented measures intended to address this pressure and provide some interim feedback, the fact remains that in most cases, the grade is premised almost entirely on one exam that typically requires and rewards a discrete skill set that comprises only a minute part of what lawyering requires.

Compounding the pressure exerted by high-stakes exams is the fact that they are neither designed nor intended to provide formative feedback. As Erwin Chemerinsky states with unapologetic candor, “[t]his is impossible to justify from a pedagogical perspective.”<sup>95</sup> If law schools truly exalt the skill of “thinking like a lawyer,” they cannot subscribe to the belief that this skill is fully imparted through classroom exercises and observations in the absence of corrective feedback that enables students to gauge their mastery of the material; individual feedback ought to be a high priority. A mere numerical grade and its placement within a mandatory curve provides little more guidance than allowing a student to see how she compares to her competitors, not whether she has mastered the material. Nor does it impart assistance in identifying areas of weakness (other than test-taking ability) and providing concrete, constructive suggestions as to strategies to improve performance.<sup>96</sup> Self-reflection and motivation are not

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method contributes to the gap between legal education and practice.”). *But see generally* Eric E. Johnson, *A Populist Manifesto for Learning the Law*, 60 J. LEGAL EDUC. 41 (2010) (arguing that law professors should endeavor to make the law easier to learn rather than engage in obfuscation; for example, by encouraging and adopting revamped casebooks that more closely resemble classic textbooks, intent on explaining the law, instead of rendering portraits of sometimes impenetrable concepts and presenting judicial opinions that were not written for an audience of novices).

92. BEST PRACTICES, *supra* note 3, at 211 (quoting Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 362 (2001)).

93. Peggy Cooper Davis, *Slay the Three-Headed Demon!*, 43 HARV. C.R.-C.L. L. REV. 619, 622 (2008) (“The fixed curve interferes with learning. It motivates students to work for grades rather than for comprehension or skill development.”); *see* Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 915 (1997) (acknowledging that law schools will continue to utilize mandatory grading curves despite compelling reasons not to).

94. BEST PRACTICES, *supra* note 3, at 176 (“The single exam tradition remains with us today, despite long-standing criticisms from academics, practitioners, and students.”).

95. Chemerinsky, *supra* note 22, at 597.

96. *See* Note, *Making Docile Lawyers: An Essay on the Pacification of Law Students*, 111



encouraged by digits. Mandatory grading curves only exacerbate this pressure.<sup>97</sup> Moreover, mandatory curves can chill collaboration, as peers are perceived as competitors in a zero-sum game, deterring students from approaching learning as a mutually supportive and beneficial enterprise. The high stakes and isolation can cause profound stress and self-doubt.<sup>98</sup> Since this is often the only feedback students receive, other than the first year legal research and writing curriculum (LRW), which is often ungraded or not calculated in GPA,<sup>99</sup> summative assessment becomes the only indicia of success by which the students feel they can measure themselves. Students can come to believe that they are nothing more than the sum of their grades<sup>100</sup> and class rank,<sup>101</sup> disregarding a constellation of other skills they possess, including many that are integral to good lawyering but are neither formally recognized nor universally valued at the law school.<sup>102</sup>

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HARV. L. REV. 2027, 2036 (1998) (stating that “[t]he significance of grades thus becomes inflated because without more personalized feedback, grades provide students with the only indication of their performance”).

97. Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L.J. 247, 263-64 (2008) (criticizing curved grading).

98. See Grant H. Morris, *Preparing Law Students for Disappointing Exam Results: Lessons from Casey at the Bat*, 45 SAN DIEGO L. REV. 441, 452 (2008) (noting the negative impact of law school grading systems on student self-esteem).

99. Motivations may vary for schools that decline to grade LRW courses or to exclude those grades from a student's GPA. The decision could be premised on a desire to decrease stress and foster learning, although that rationale is arguably applicable to all grades in the first year. Alternatively, excluding LRW work from grading or inclusion in GPA could be related to status and hierarchy concerns. Because legal writing is often taught by professors without full integration into the academy, some may believe that the grades in legal writing do not reflect sufficient academic rigor to compete with grades in doctrinal classes, or that the faculty is insufficiently qualified to assess student achievement.

100. Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273, 291 (2010) (arguing that students often perceive opportunities within the law school and future employment prospects as directly correlated with grades, which can cause distress that “typically manifests itself in isolation, detachment from the academic process, and a corresponding loss of self-confidence and motivation”).

101. Hess, *supra* note 64, at 78 (noting that concern with grades and class rank causes significant stress for law students and that “[t]he significance of grades becomes inflated because students get so little feedback during the semester that grades are the only indicator of their performance”).

102. Empathy, interpersonal skills, professionalism, creative problem solving, and a host of others skills are necessary to the competent representation of clients. See generally Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 CLINICAL L. REV. 299 (1997). On a peripheral but relevant note, considerable debate has circulated among clinical faculty about the relative merits of grading, although no monolithic position has resulted. One position holds that if doctrinal classes are graded, clinics should follow suit to avoid sending a tacit message about the comparative worth of the endeavors and the skills

The emphasis on grades and the narrow skills they assess under the current regime does serve a purpose by sorting students for prospective employers, thereby streamlining the student selection process. Moreover, class rank dictates more than just job opportunities, as it is often the benchmark by which other learning opportunities in the law school are meted out.<sup>103</sup> The emphasis on grades as predictive of the quality of a student's future legal work is misplaced, as there is no definitive study correlating class rank with being an effective and professional attorney.<sup>104</sup> Presumably, this is in part because lawyers are rarely called upon to produce a three-hour written, issue-spotting, closed-book test, and the outcome of legal disputes is not determined by a high-stakes exam. Instead, effective advocacy requires interpersonal communication and problem-solving skills and adherence to ethical and professional norms, qualities that are rarely factored into a student's class rank.<sup>105</sup> Other criticisms impugn the accuracy and consistency of grading, arguing that the process is ultimately infused with an

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the clinics impart. *See id.* at 327-28. They further contend that for students who work incredibly hard, a grade of "pass" does not reflect the enormous efforts the students have expended and equates them with students who barely clear the hurdle of a passing grade, an outcome which is fundamentally unfair. In contrast, other clinicians suggest that dispensing with grading fosters a more collaborative learning environment; that sometimes grading clinics as other courses is like comparing apples to oranges depending on the vagaries of individual cases and the inherent difficulty of making quantitative and qualitative comparisons of intangible skills; and that students should rely on some intrinsic motivation to excel at the enterprise, not the external reward of a grade. *See id.* at 321 n.58. This debate among clinicians fleshes out additional concerns about grading. *See generally id.*

103. Glesner Fines, *supra* note 93, at 879 (arguing "that law schools rely too much on grading systems (as opposed to evaluation systems); that requiring norm-referenced grading undermines an effective learning environment; and that ranking is wholly counterproductive in a program designed to prepare individuals to serve justice"). Glesner Fines suggests that law schools delay ranking [students] until the second semester [of the first year], or even the second year of law school, could base first-year grades on a pass/fail system, or could weight the cumulative GPA to give greater emphasis to upper-level grades. Where grades are used to restrict access to law school programs, such as [l]aw [r]eview, seminars, or competitions, law schools should be especially wary that our academic reward systems do not aggravate inequality by providing richer, more effective learning opportunities for some students than others.

*Id.* at 910.

104. *See* James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. REV. 1823, 1828 (2006); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 58, 63-64 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1245-46, 1252 (1991); Daniel Keating, *Ten Myths About Law School Grading*, 76 WASH. U. L.Q. 171, 172 (1998).

105. *See generally* John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007) (proposing legal education reform and presenting various tables quantifying legal skills).



element of randomness, creating an outcome which is wholly unacceptable given the importance of class rank.<sup>106</sup>

The exclusive reliance on high-stakes testing has cemented its place in legal academia for several reasons. Among those is that it is far more labor-intensive to provide frequent and detailed feedback to students than summative assessments, and law school faculty seem reluctant to hire teaching assistants.<sup>107</sup> For many law school classes, large enrollment is the norm since “[i]t is also very cost-effective to have one teacher in front of a large number of students.”<sup>108</sup> To further justify end of semester, high-stakes summative feedback, some argue that students should be subjected to the type of testing they will need to excel at in order to pass the bar.<sup>109</sup> The focus on grades and the power they wield over a student’s sense of self and optimism for the future offer a compelling reason to encourage schools to invest heavily in their academic support programs.<sup>110</sup> The singular focus of the grading system creates intense pressure, and the high stakes associated with student performance can lead to depressed, disaffected students.<sup>111</sup>

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106. See generally Jeffrey Evans Stake, *Making the Grade: Some Principles of Comparative Grading*, 52 J. LEGAL EDUC. 583 (2002) (analyzing the technical intricacies of the law school grading system).

107. See Chemerinsky, *supra* note 22, at 597.

108. *Id.* at 595.

109. For further discussion of the bar exam, see *infra* Part III.E; see also AM. BAR ASS’N, 2010-2011 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 21, available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011\\_standards/2010-2011abastandards\\_pdf\\_files/chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011abastandards_pdf_files/chapter3.authcheckdam.pdf) (“A law school shall not continue the enrollment of a student whose inability to do satisfactory work is sufficiently manifest so that the student’s continuation in school would inculcate false hopes, constitute economic exploitation, or detrimentally affect the education of other students.”). The corresponding obligation to weed out students who are statistically unlikely to pass the bar can cause some shortsighted and ultimately counterproductive results. For example, some students who pursue legal education as a powerful social and political tool and have no intention of practicing law could be edged out despite the irrelevance of bar passage potential. Also, the pressure to identify underperforming students could lead schools to ratchet up academic dismissal rates or ask students to aver that they will not take the bar exam, lest the results negatively impact the school’s reputation. Academic dismissal after “only” the first year may minimize the financial and emotional cost, but it can be devastating. This is not to suggest that schools should never academically dismiss students, but instead that schools should undertake this task judiciously and humanely and not be solely driven by statistics. The overarching goal should be first to support underperforming students.

110. Academic support programs should be carefully designed and structured to avoid singling out students and sending the message that they are destined to struggle, as such messages may create a self-fulfilling prophesy, undermine rather than bolster the acquisition of skills and confidence, and reinforce insidious stereotypes. See generally Louis N. Schulze, Jr., *Alternative Justifications for Law School Academic Support Programs: Self-Determination Theory, Autonomy Support, and Humanizing the Law School*, 5 CHARLESTON L. REV. 269 (2011).

111. Morris, *supra* note 98, at 442-43.

Most law students presumably excelled at their undergraduate institutions, and the adjustment to struggling with the academic rigors of law school can be difficult and disorienting.<sup>112</sup> Further intensifying the stress is that in some instances, the pressure to perform well can have an immediate and devastating financial impact.<sup>113</sup>

A final criticism is that the intensely competitive atmosphere fostered by jockeying for class rank may serve to reinforce the zero-sum game adversarial model that pervades lawyering,<sup>114</sup> causes discontent and distress, and generates negative public perceptions along with a host of other drawbacks. Recognizing the costs of a system that valorizes the combative nature of some lawyering is becoming more widespread, and alternative approaches to lawyering in general—specifically, conflict resolution—are gaining a foothold.<sup>115</sup> Despite evidence of the failings of the grading system employed almost universally by law schools, entrenched reasons cement their hold, some related to academic integrity and others related to less noble objectives.<sup>116</sup>

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112. *Id.* at 450-51 (noting that students internalize grades, and those who are “condemned with a grade of C” believe they “are marginal at best”).

113. For some schools that award merit aid as a part of their financial aid package, the grant is accompanied by a requirement that the student must remain above a certain percentile/class rank, which is statistically impossible to achieve for all students receiving merit aid packages. *See, e.g.,* David Segal, *Law Students Lose the Grant Game as Schools Win*, N.Y. TIMES, Apr. 30, 2011, available at [http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=1&\\_r=1&sq=law%20school&st=cse&scp=2](http://www.nytimes.com/2011/05/01/business/law-school-grants.html?pagewanted=1&_r=1&sq=law%20school&st=cse&scp=2); *see also* Glesner Fines, *supra* note 93, at 886. This increases the pressure and stakes exponentially. Schools presumably disclose to students that they must maintain a certain class rank or standing in a certain percentile and that as a result of the amount of aid given out, some students will, as a statistical certainty, lose their aid. However, many students, unaccustomed to mandatory grading curves, may be unable to realistically assess their chances of losing their merit aid or to fully comprehend the pressure such a requirement will add to an already stressful transition. This system, intended to lure students to a less expensive option that inures primarily to the benefit of law school revenue and enrollment statistics, is unconscionable.

114. CARNEGIE REPORT, *supra* note 2, at 149 (quoting a student as saying, “The whole adversarial system is set up to produce winners and losers, just as the grading curve creates winners and losers.”).

115. *See infra* Part III.N. I do not mean to suggest that litigation or aggressive lawyering never has its place. Adversarial lawyering is clearly warranted in some circumstances, but in certain situations, adversarial lawyering can ultimately yields results that inflict enduring harm on all involved, even the parties who prevailed under conventional standards. This is particularly true in cases such as divorce and special education, when the parties are likely to have a vested interest in maintaining the ability to work cooperatively in the future. In such instances, a “scorched earth” approach can extinguish any residual goodwill. Even in less obvious scenarios, cooperative problem solving may lead to more buy-in from the parties. Less contested outcomes in cases involving a more cooperative approach may help illuminate the broader and long-term implications of adversarial dispute resolution processes.

116. Peterson & Peterson, *supra* note 65, at 381 n.154 (“In a discussion before a recent moot



3. *Professional Ideals/Professionalism*.—The system of legal education was initially premised on the exalted concept of citizen lawyers.<sup>117</sup> Over time, however, these ideals were sometimes eclipsed by the lure of high-salary, high-prestige jobs. As a result, the connection between lawyering and the greater social good became increasingly attenuated.<sup>118</sup> For students who embark on their legal education with lofty goals, the recalibrated focus dislocates the ideals that brought them to school, as they find little resemblance to the noble profession they aspired to join.<sup>119</sup>

Legal educators seem to shrink from discussions about their role in shaping professional ideals. Professors seem comfortable issuing definitive answers about doctrine but less so in advancing their beliefs about justice and professionalism. If there is no room to convey normative judgments, professors leave students with little guidance about how to develop their own professional values, other than what they surmise or absorb by osmosis. In hiding behind tenets of neutrality to cover the reluctance to weigh in on these matters, legal educators may tacitly and inadvertently send the message that matters of professionalism are wholly relegated to the realm of personal choice. Given the stakes, legal educators need to provide guidance and leadership on these issues by articulating aspirations for professional behavior.<sup>120</sup> Indeed, “instead of sending the positive message they are capable of, law faculty may inadvertently send a message of indifference and unimportance regarding the most important aspect of being a lawyer—being human.”<sup>121</sup> The absence of attention leaves students to develop their professional ideals in a vacuum.

4. *The Economics: Grim Job Prospects, Rising Tuition,<sup>122</sup> and Crushing*

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court final argument at George Washington University Law School, Justice Scalia and two distinguished circuit judges agreed that the abandonment of grades was not a realistic possibility for the vast majority of law schools.” (citation omitted)).

117. The visibility and importance of lawyers in our society started long before the big firm model made them very wealthy.

118. See CARNEGIE REPORT, *supra* note 2, at 150 (noting that law school can disconnect law practice from any social significance).

119. See Krieger, *Inseparability*, *supra* note 64, at 433-34.

120. Various bar committees have developed and distributed aspirational standards for professionalism. See BARBARA GLESNER FINES, RESEARCHING PROFESSIONAL RESPONSIBILITY, CH. 3, <http://law2.umkc.edu/faculty/profiles/glesnerfines/bgf-13.htm> (last visited June 9, 2011) (“Today, most states have adopted a version of the Model Rules of Professional Conduct, which provides regulatory standards for the most part. However, additional aspirational . . . [tenets] have been promulgated by specialized professional associations or state and local bar groups.”).

121. Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20 PROF. LAW. 1, 15 (2010).

122. Bill Henderson, *Law School 4.0: Are Law Schools Relevant to the Future of Law?*, LEGALPROF. BLOG (July 2, 2009), [http://lawprofessors.typepad.com/legal\\_profession/2009/07/law-school-40-are-law-schools-relevant-to-the-future-of-law.html](http://lawprofessors.typepad.com/legal_profession/2009/07/law-school-40-are-law-schools-relevant-to-the-future-of-law.html) (“Over the last 30 years, the cost of a legal education has increased approximately three times faster than the average household incomes. Yet, it is difficult to identify a corresponding innovation within legal education that

*Debt.*—As a result of astronomical tuition increases, law students are saddled with withering debt that they have no guarantees of servicing, given the constricted job market.<sup>123</sup> The rapid escalation of tuition bills is justified neither by transformative reforms in legal education that would warrant the escalation of costs nor by being pegged to inflation. Nevertheless, ascending costs translate to crushing student debt.<sup>124</sup> The outgoing dean of Northwestern University opined that the break-even salary for law graduates is \$65,000.<sup>125</sup> Another study suggests that the figure is even higher than that.<sup>126</sup>

Despite the obvious importance of providing students with information necessary to gauge their job and salary prospects post-graduation, those interested in reviewing alumni employment and salary data face lamentable impediments to uncovering unvarnished statistics about individual institutions. Reported income and employment statistics for law schools can be inaccessible and ultimately misleading for a variety of reasons: a few high-paying jobs raise the average, skewing the real median income;<sup>127</sup> law schools dissemble behind fudged figures; unemployed or underemployed graduates are less likely to respond to inquiries; and some law schools have recently experimented with providing short-term research jobs to recent graduates to elevate employment rates that do not reflect jobs obtained in the real legal marketplace. Optimism expressed by law schools is belied by the real numbers. According to the National Association of Law Placement (NALP) website, the rate of student employment is at its lowest rate since the early 1990s.<sup>128</sup> The employment rate fell almost 4% over the prior

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justifies the higher cost.”); Elie Mystal, *Even U.S. News Suggests Law School Tuition Is Getting Ridiculous*, ABOVE THE LAW (July 15, 2010, 10:58 AM), <http://abovethelaw.com/2010/07/even-u-s-news-suggests-law-school-tuition-is-getting-ridiculous/#more-26942>.

123. The ABA has recently released a memo entitled “The Value Proposition of Attending Law School,” which advises prospective students to carefully consider the consequences of undertaking debt. AM. BAR ASS’N, THE VALUE PROPOSITION OF ATTENDING LAW SCHOOL (2009), available at <http://www.abanet.org/lld/legaled/value.pdf>.

124. Debt can dampen the goals and ideals that inspired them to attend law school in the first place. See EQUAL JUSTICE WORKS, FROM PAPER CHASE TO MONEY CHASE: LAW SCHOOL DEBT DIVERTS ROAD TO PUBLIC SERVICE 6 (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lrapsurvey.authcheckdam.pdf> (“Faced with staggering law school debt, many law school graduates must forgo the call to public service despite their interest and commitment to such a career.”).

125. David Lat, *Changes in Legal Education: Some Thoughts from Dean David Van Zandt*, ABOVE THE LAW (Feb. 3, 2010, 8:23 PM), <http://abovethelaw.com/2010/02/changes-in-legal-education-some-thoughts-from-dean-david-van-zandt/>.

126. Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, COLUM. BUS. L. REV. (forthcoming 2011) (manuscript at 73), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1680624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680624).

127. See Annie Lowrey, *A Case of Supply v. Demand*, SLATE (Oct. 27, 2010, 4:14 PM EST), <http://www.slate.com/id/2272621/pagenum/all/#p2>.

128. Press Release, Nat’l Ass’n of Legal Placement, Class of 2009 Faced New Challenges with Recession: Overall Employment Rate Masks Job Market Weakness (May 20, 2010), available at



two years; nearly 25% of jobs were classified as temporary, including judicial clerkships; 10% of jobs were part-time; and 70.8% were employed in positions that required a J.D., representing a decrease from previous years.<sup>129</sup> These figures include graduates employed by their alma maters.<sup>130</sup>

For students unable to command a salary sufficient to service their debt (or find employment at all, for that matter), the consequences can be financially catastrophic.<sup>131</sup> Yet it can be difficult for law students to grasp the harsh reality—that for many of them, law school is not a wise investment—until they have already matriculated.<sup>132</sup> *Forbes Magazine* characterized student debt as “an unfolding education hoax on the middle class that’s just as insidious, and nearly as sweeping, as the housing debacle.”<sup>133</sup> For those idealistic students fighting valiantly to dig out of a mountain of debt, the viability of working in public interest work will be even more remote.<sup>134</sup> One lawyer argued that the glut of law schools and the graduates they churn out at unsustainable rates is partially

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<http://www.nalp.org/2009selectedfindingsrelease>.

129. *Id.*

130. *Id.*

131. Burk & McGowan, *supra* note 126, at 74 (“[M]any graduates of less prestigious law schools, and many graduates with less distinguished academic records and similar credentials, are having a very hard time finding jobs remunerative enough to support the levels of student-loan debt common among recent graduates, let alone recoup the investment of time and money law school represents for them.”).

132. ABA Standard 509 requires law schools to provide “basic consumer information,” which could be expanded to more fully illuminate the economics for prospective students. AM. BAR ASS’N, *supra* note 109, at 38-39. Whether further information would be useful is questionable, however, if students do not fully comprehend that many law schools utilize mandatory grading curves and distinct pedagogical underpinnings that differ significantly from typical undergraduate teaching and assessment philosophies, a difference that may impede their ability to parallel undergraduate performance. If students unrealistically expect that they will be the exceptions to salary and employment statistics, additional information may be insufficient to spark a more realistic assessment.

133. Kathy Kristof, *The Great College Hoax*, FORBES, Feb. 2, 2009, available at <http://www.forbes.com/forbes/2009/0202/060.html>.

134. In my personal conversations with students who came to law school committed to public interest work, the stress about finding employment is often raw and palpable. My inability to offer reassurances leaves me feeling like I am complicit in their distress. The federal government has instituted a loan forgiveness program that includes lawyers working in public interest jobs (broadly defined), but this is only available for public loans. See *Public Service Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/publicservice.phtml> (last visited June 9, 2011). Given the cost of education, many students are saddled with substantial private loans for which there is no relief. By limiting eligibility for loan forgiveness to those working for non-profits, the program excludes lawyers who may make low wages working to respond to underserved communities. This may serve to discourage people further from experimenting with innovative service delivery models—such as the private public interest law firm—because they are technically for-profit enterprises, rendering employees ineligible for loan forgiveness.

responsible for suppressed wages<sup>135</sup>—43,588 students received a J.D. degree in 2008, an increase of 11.5% since 2000.<sup>136</sup> Placing blame on the ABA for weak regulatory oversight, he invited the federal government to limit the accreditation of new law schools as a measure designed to stanch the flow of students lured to law school with unrealistic hopes of seeing a fair return on their investment.<sup>137</sup>

### *F. Conclusion*

Theories abound as to why students are experiencing distress, and a combination of factors likely affects each student differently. Dangers attend any effort to generalize, and it is important to avoid essentializing students, as they do not present a monolithic group. Student resilience may differ based on race, gender, socioeconomic status, the presence and consistency of outside support networks, the level of financial stress, and whatever constellation of personal attributes and pressures accompany them to law school. Irrespective of the causes, the statistics documenting severe and pervasive distress paint a startling and foreboding picture. Indicators suggest that the stress of practicing law is not dissimilar from the pressure law students experience.<sup>138</sup> Law schools must explore these issues, develop palliative measures, and foster long-term resilience.

## II. RESPONSES

Suggestions for change come from diverse constituencies with disparate perspectives, motivations, and agendas. In some areas, allies for reform have made strange bedfellows. The level of responsiveness to the current conditions confronting law students varies widely within and among institutions. Some visionary, innovative, and intrepid schools have heeded the call to make real changes rather than superficial and piecemeal reforms. Others have been markedly intractable in their refusal to consider and enact meaningful reforms. The following is a sample, admittedly quite limited, of some relatively recent efforts to craft meaningful reforms.

### *A. Humanizing/Balance in Legal Education*

Because law school and law practice are inordinately stressful for many participants, a small but passionate group of educators has been striving to make law school and lawyering more humane. Their mission is defined as “seeking to maximize the overall health, well being and career satisfaction of law students

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135. Mark Greenbaum, *No More Room at the Bench*, L.A. TIMES, Jan. 8, 2010, available at <http://articles.latimes.com/2010/jan/08/opinion/la-oe-greenbaum8-2010jan08>.

136. Lowrey, *supra* note 127.

137. See Greenbaum, *supra* note 135.

138. William E. Livingston, *De-Stressing the Profession*, 81 MICH. B.J. 25, 26 (2002) (“Work overload, competition, dealing with difficult people, and time pressures are stressors found in many professions. Unique to law, however, are legal role conflicts, an adversarial system of justice, and certain areas of practice with a more pronounced level of conflict.”).



and lawyers.”<sup>139</sup> In an earlier incarnation, the movement self-identified under the umbrella of “humanizing legal education,” and more recently, the group was accepted as an Association of American Law Schools (AALS) section entitled “Balance in Legal Education.”<sup>140</sup> This movement has spawned a number of articles theorizing about the problems and proposing solutions. Despite the severity and ubiquity of reported distress, neither the harsh statistics nor the heroic efforts of these educators appear to have ignited a national conversation aimed at getting to the root of the problem.<sup>141</sup> According to those committed to humanizing legal education, the goal of humanizing legal education will only be realized by wholesale reevaluation of the process by which we educate lawyers, as well as the culture of practice.<sup>142</sup> Despite the enormity of this task, it should be undertaken with a sense of urgency. The discussion must be inclusive and expansive, and “[t]o truly humanize legal education we must step out of the classroom and hallways and advocate on behalf of our students. We must step into the admissions and financial aid offices and take into account the values of investing in our students.”<sup>143</sup>

Reform must be holistic and comprehensive, and it cannot limit its focus to just curriculum or job prospects. As Barbara Glesner Fines observes, schools cannot just “[a]dd humanizing and stir.”<sup>144</sup> Glesner Fines defines three core principles of humanizing legal education.<sup>145</sup> The first, to “do no harm,”<sup>146</sup> requires professors to attend to the environment they create and to recognize and mitigate the stressors that make law school such a devastating experience for many students.<sup>147</sup> Second, professors are exhorted to understand their students

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139. *Humanizing Law School*, FLA. STATE UNIV. COLL. OF LAW, [http://www.law.fsu.edu/academic\\_programs/humanizing\\_lawschool/humanizing\\_lawschool.html](http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html) (last visited June 9, 2011).

140. Bruce J. Winick, *Greetings from the Chair*, EQUIPOISE, Dec. 2009, at 1, available at [http://www.aals.org/documents/sections/balance/BalanceInLegalEdDec\\_09.pdf](http://www.aals.org/documents/sections/balance/BalanceInLegalEdDec_09.pdf). The Florida State University College of Law was recognized by the new section as making a significant contribution to the group’s mission by hosting a listserv devoted to the topic of balance in the legal education field and facilitating discussion therein. *Id.*; see also *Humanizing Ideas*, FLA. STATE UNIV. COLL. OF LAW, <http://humanizingideas.law.fsu.edu/default.asp> (last visited June 9, 2011).

141. Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 321 (2008).

142. *Id.* at 317-18.

143. *Id.* at 325.

144. *Id.* at 318.

145. *Id.* at 313.

146. *Id.*

147. *Id.* at 315-18; see also Herndon, *supra* note 70, at 815-17 (observing that the best attribute of the class rank system is that it helps employers with selecting job candidates, but noting that this system is unreliable, primarily because it offers a limited assessment of a student’s full ability); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1186 (2008) (“The class rank system has not changed substantively from its origins at Harvard in 1887. Class rank, based on grades received on law school examinations, continues to serve as the competitive selection process for

and interact with the same compassion that they expect students to cultivate toward their clients.<sup>148</sup> Finally, Glesner Fines provides a poignant reminder of the core values of humanism, which embraces working toward peace and justice and encourages professors to nurture these ideals in their students.<sup>149</sup> The critique of law and legal institutions is not enough—lawyering itself must also be scrutinized. Self-awareness is empowering, and “[s]tudents at least need to be made aware, not only of the various sorts of lawyer they might become but also of the various kinds of approaches they can take toward lawyering itself.”<sup>150</sup> Larry Krieger, a pioneering voice in the humanizing movement, excerpted several parts of his article for distribution to students, exhorting them to identify their core values, maintain perspective about what really matters, and strive for a healthy balance in their lives.<sup>151</sup>

Deviation in law school from the established norm of uniformity can be perceived as heretical, and the traditional curriculum and structure of interactions between professor and student is viewed by some as sacrosanct. Moreover, the assumptions that law schools should toughen students up, not attend to their inner lives, can be veiled behind objections about academic rigor. Given the entrenched ethos, institutional will is required to shake the traditional law school curriculum from its firmly planted roots.

### B. Outcome Measures

Another area that spawns acrimonious and suspicious debate is the topic of “outcome measures,”<sup>152</sup> which are widely employed by other accrediting

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membership on law review, law school honors, and as a gate-keeping mechanism for legal employers. Legal employers use a student’s class rank to determine who they will interview for positions, refusing to consider students who do not make the strict cut-off point. Moreover, even if a law firm elects to interview students from lower-tiered schools (and many will not), the class rank cut-off point for graduates at lower-tiered schools is significantly lower than where it is for graduates at more prestigious schools. Thus, similar to what occurs with the overall ranking of law schools, the economic value of a law degree will depend on the class rank of the student.” (footnotes omitted)); Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 RUTGERS L. REV. 867, 1006 (2009) (noting that employers may also benefit from access to a comprehensive portfolio outlining a law student’s accomplishments, “encouraging attention to more than class rank and grades,” thereby providing a better evaluation of a student’s overall legal capacity). I can state from experience that some of my most academically successful students were not necessarily those whom I expected would be the most effective advocates.

148. Glesner Fines, *supra* note 141, at 319.

149. *Id.* at 322-23.

150. CARNEGIE REPORT, *supra* note 2, at 132.

151. Lawrence S. Krieger, *What We’re Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 18 (1999) (exhorting students to maintain balance between career and family and to stay loyal to their ideals.).

152. In discussions regarding whether schools satisfy their learning objectives, the ABA is considering various changes to the current standards, including the implementation of outcome



agencies.<sup>153</sup> The movement to implement outcome measures emanates from dissatisfaction with the current system of reporting “input measures,” such as the number of volumes in a library, faculty-student ratios,<sup>154</sup> per pupil expenditures, and bar passage rates. Critics argue that the typical comparative input measures do little to truly illuminate the value of the educational experience for students and do not empower them to make meaningful comparisons to other law schools.<sup>155</sup> To remedy this problem, those advocating for the imposition and institutionalization of outcome measures argue that law students deserve transparency and the ability to make informed decisions about how they will be edified and enriched by the selection of a particular law school program.

Skeptics of outcome measures enumerate a number of objections. In a letter outlining concerns, the Society of American Law Teachers (SALT) reiterated the most frequently stated objections to the prospective change in standards: that the proposed “accreditation [s]tandards are overly prescriptive, will be a costly administrative endeavor, and will force law schools to reduce everything to a quantifiable measure and thus [spur] . . . a ‘race to the bottom.’”<sup>156</sup> Building

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assessments. According to the most recent draft:

The following methods, when properly applied and given proper weight, are among the acceptable methods to measure the degree to which students have attained competency in the school’s student learning outcomes: review of the records the law . . . [school] maintains to measure individual student achievement pursuant to Standard 304, evaluation of student learning portfolios, student evaluation of the sufficiency of their education, student performance in capstone courses or other courses that appropriately assess a variety of skills and knowledge, bar exam passage rates, placement rates, surveys of attorneys, judges, and alumni, and assessment of student performance by judges, attorneys or law professors from other schools. The methods to measure the degree of student achievement of learning outcomes are likely to be different from school to school and law schools are not required by this standard to use any particular methods.

AM. BAR ASS’N, REPORT OF SUBCOMMITTEE ON STUDENT LEARNING OUTCOMES 5 (2011), *available at* <http://apps.americanbar.org/legaled/committees/comstandards.html> (scroll down to “Meeting Date: January 8-9, 2011” and click “Report of Subcommittee on Student Learning Outcomes”).

153. These include business, architecture, pharmacy, and dental schools. Karen Sloan, *Holding Schools Accountable*, NAT’L L.J., Feb. 22, 2010, *available at* <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443899383>.

154. Faculty-student ratios do not provide enough information for students to make knowledgeable assumptions about the accessibility of faculty, whether ratios translates to class size, and, if so, whether this is present across the board or solely in introductory lecture classes or seminars.

155. See Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 U. TOL. L. REV. 269, 269 (2010) (“An emphasis on assessment and outcomes measures is a drum beat that is growing louder in American legal education.”).

156. Letter from Raquel Aldana & Steven Bender, Co-Presidents of the Soc’y of Am. Law Teachers (SALT), to Donald Polden, Dean of Santa Clara Law Sch., and Steven C. Bahls, President of Augustana Coll. 1 (Mar. 8, 2010), *available at* <http://www.saltlaw.org/userfiles/file/3-5->

consensus on defining the requisite skills and the more thorny and elusive problem of measuring them are daunting tasks. Critics are concerned that a new standard would be too magisterial, requiring an inflexible, designated curriculum with little room for faculty to develop and pilot innovative programs tailored to their institutional mission.<sup>157</sup> They further worry about the potential cost of implementing such a system,<sup>158</sup> pointing out that because law schools lack the expertise to design and administer outcome assessments, they may be forced to seek outside consultants, driving up costs and intruding on law school autonomy.<sup>159</sup> Finally, commentators worry that schools could develop disparate standards and even allow schools to thwart even the most minimal alternations.<sup>160</sup> SALT proposed a middle ground by suggesting the mandate to provide instruction on a set of core lawyering skills that every law student should master irrespective of the area of practice, while allowing latitude to individual institutions to develop programs consistent with their specific programmatic goals.<sup>161</sup> Resistance also emanates from concern about the economics of implementing assessment measures, which coincide with calls to enhance and expand the labor intensive enterprise of skill building.

Further criticism of output measures is premised on the concern that they are part of a larger insidious effort to deregulate the legal academy, thereby devolving to law school administrators the “full discretion to determine their own mission and to inaugurate a curriculum to fulfill that mission.”<sup>162</sup> If the ABA adopts standards related to outcome measures, careful design will be critical to ensure that the priorities and values embedded in the current methodology do not inadvertently reinforce the outdated norms educators are hoping to revise.

Another risk is the difficulty of assessing the mastery of intangibles, such as internalized habits of self-reflection. Perhaps most alarming is the fear that outcome measures will be purely focused on bar passage without examining the inherent problems and shortcomings of the bar exam as the ultimate gatekeeper of the profession. Moreover, a focus on the relatively easy-to-measure bar passage results could compel schools to “teach to the test” to the exclusion of other worthy and important competencies. At a minimum, it would be useful to incorporate an expansive conception of the outcomes schools implicitly value by implementing measurements of success, writ large.

The significant risks of new standards have to be weighed against the right

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10SALTSuggested%20Modifications%20to%20Standard%20302.pdf.

157. See *id.* at 2, 4.

158. Katherine Mangan, *Law Schools Resist Proposal to Assess Them Based on What Students Learn*, CHRON. HIGHER EDUC., Jan. 10, 2010, available at <http://chronicle.com/article/Law-Schools-Resist-Proposal-to/63494/> (“Given the fragility of the legal profession and the fragility of law-school finances, it’s a tough time to think about taking on a major process of assessment.” (quoting Lauren K. Robel, Dean, Ind. Univ. Maurer Sch. of Law)).

159. Aldana & Bender, *supra* note 156, at 5-6.

160. *Id.* at 2, 4.

161. *Id.* at 2.

162. Kuehn, *supra* note 53, at 2.



of students to rely on the stated educational mission of a law school and the institution's ability to satisfy that mission by providing effective instruction in those areas. Despite the risks and challenges, the imposition of outcome measures is likely to prompt a vigorous debate about what should be measured and, presumably, why those skills are important, generating the possibility for a constructive dialogue.

*C. Procedural and Structural Changes to Accreditation Standards/Structural Changes to the Academy*

A variety of proposed changes to the current accreditation standards threaten to uproot the underlying structure of law school. The process and substance of the debate are provoking much consternation within the academy. For example, objecting to procedural changes, the Clinical Legal Educators Association (CLEA) recently expressed dismay that in the process of altering longstanding accreditation standards, the standards review committee failed to solicit opinions and invite the participation of various stakeholders impacted by reform efforts.<sup>163</sup> In particular, CLEA objected to procedural changes that signaled the unwillingness of the committee to seriously consider comments during the formative stage of developing reform.<sup>164</sup> CLEA expressed concern that the availability of subsequent opportunities to comment would be essentially illusory since proposed changes would already be cemented and therefore unchangeable.<sup>165</sup> Of particular concern is that the committee appeared to rely almost exclusively on the agenda advanced by the American Law Deans Association (ALDA), an organization proposing radical deregulation of the legal academy.<sup>166</sup> As outlined in the concerns expressed by CLEA, the flawed process creates the distinct possibility that legal education could be fundamentally altered while excluding many dissenting voices and eclipsing any meaningful effort at consensus-building.

The concerted effort to deregulate the law school accreditation process is inflamed by what can be reasonably perceived as the veiled goal of moving to an entrepreneurial model of legal education, with deans emboldened to function as autocratic business leaders. The obvious price of deregulation if taken to its extreme would be the end of "job security, academic freedom, and meaningful participation in law school governance."<sup>167</sup> Under an extreme version of this model, law schools would have little or no full-time faculty, allowing them to contain costs and be nimble to effectuate changes, untethered to the demands of

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163. Letter from Robert Kuehn, President, CLEA, to Hon. Christine Durham, Chair, Council on Legal Educ. & Admissions to the Bar and member, Utah Supreme Court; Hulett H. Askew, Consultant on Legal Educ.; and Donald J. Polden, Dean, Santa Clara Law Sch. 2 (Nov. 4, 2010), available at <http://cleaweb.org/CLEA%20Letter%20on%20Standards%20Review%20process%2011-04-10.pdf>.

164. *Id.*

165. *Id.*

166. *Id.* at 2-3.

167. See Kuehn, *supra* note 53, at 2.

faculty governance that can be notoriously contentious and obstructionist. One argument to justify a reduction in full-time faculty members is based on criticisms of the utility of increasingly esoteric faculty scholarship that is produced on the backs of law students, with no real attendant benefit to the students.<sup>168</sup> According to this argument, the money spent supporting law professors to produce scholarship could be better spent providing direct benefits to the students who finance those salaries. In a move that is less of a threat to the traditional law school faculty, ALDA is strongly pushing to eliminate security of position for clinical faculty.<sup>169</sup> Motivated, at least in part, to respond to the increasing cost of legal education, the member deans are demanding more freedom and power to tinker with faculty security, status, and salary.<sup>170</sup>

Although the underlying motivation of easing the financial burden of legal education is commendable and long overdue, the downsides of the ALDA proposal are considerable. Once launched, these modifications could lead down a slippery slope, ultimately signaling the reincarnation of the legal academy into mere technocratic enterprises. One school of thought touts the benefits of replacing at least some of the immovable and expensive full-time faculty with a more flexible, less demanding group of adjuncts,<sup>171</sup> a group without any vested stake in democratic law school governance. Under such a model, law students could be taught by less expensive, less organized, and transient adjuncts who work at the pleasure of the dean.<sup>172</sup> Undoubtedly, if the ABA authorizes the

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168. Thies, *supra* note 51, at 599 (“No longer can schools continue to subsidize academic research at the expense of teaching practical skills to their graduates.”); *see also* Newton, *supra* note 41, at 135-36 (“[M]any tenured professors continue to publish impractical law review articles in highly ranked reviews because such publications yield benefits even after tenure. Despite the extensive post-secondary education possessed by many law professors hired during the last decade, the quality of teaching by such faculty members (as a class) is deficient, particularly in preparing students to actually practice law (which should be the primary mission of a professional school for future attorneys).” (internal citations omitted)); Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 161-62 (2008) (“[S]cholarship and teaching have increasingly diverged . . . . The scholarship that receives most attention these days, and that brings its authors most renown, is largely disconnected from the required first year curriculum and increasingly remote from all but the most specialized and sophisticated upper class courses.”).

169. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 214 (2008).

170. *See* Scott Jaschik, *Law School Professors' Tenure in Danger?*, USA TODAY, July 26, 2010, available at [http://www.usatoday.com/news/education/2010-07-26-ihe-law-tenure\\_N.htm](http://www.usatoday.com/news/education/2010-07-26-ihe-law-tenure_N.htm) (stating that the push for ABA's removal of faculty tenureship language from the ABA standards was initiated by the dean of Northwestern University, David Van Zandt).

171. *See* Sonsteng et al., *supra* note 105, at 339-41.

172. *See* John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Job Satisfaction*©, 26 WM. MITCHELL L. REV. 327, 330 (2000) (“The use of non-tenured teachers, closely supervised adjuncts, non-lawyer professionals and the best distance-learning techniques will improve training and reduce costs.”); Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 633 (2010) (noting that employing



increased use of adjuncts, such as judges and practitioners, they can provide practical skills training at decreased cost.<sup>173</sup> On the positive side, adjuncts would typically be drawn from the ranks of the practicing bar and would infuse the classroom with real life experience. However, in the absence of full-time faculty, or in the presence of one whose power has been essentially usurped, the dean would possess absolute authority to articulate and implement a law school's mission without any democratic checks and balances. Important issues that are already receiving short shrift, such as a school's commitment to justice and the inculcation of values, could become even more tangential in such a system. Although some professors rail against the contested discourse and infinite regressions that plague some faculty meetings and stifle reform efforts, there is value in the process of discussion and democratic voting, even in the face of very real power imbalances.

Despite the need to dislodge the faculty from their current comfort and complacency, I strenuously object to many of the assumptions embedded in ALDA's proposed reforms. In effect, some of the proposals could eviscerate academic freedom.<sup>174</sup> It is disheartening that hard-fought gains are facing renewed threats<sup>175</sup> such as security of position for clinicians, who at times can seem singularly vulnerable to political interference.<sup>176</sup> Retrograde as they are,

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adjunct faculty will be beneficial in two areas: teaching students practical skills and serving as a cost reduction measure). This is essentially outsourcing, as non full-time faculty, who presumably have a practice and are excluded from participation in law school governance, are unlikely to read articles about law school pedagogy in their unremunerated spare time. Although discussions at faculty meetings can at times border on the absurd, the discourse can provide cross-pollination of ideas. Law schools should not minimize the administrative burden of closely overseeing adjuncts. Moreover, the concentration of power in the hands of one omnipotent administrator certainly presents significant risks.

173. Thies, *supra* note 51, at 619-21 (proposing safeguards such as the publication of an adjunct handbook, smaller class sizes for adjuncts, attention to hiring and training, the development of a more rigorous interview process that includes the teaching presentation typically required of full-time faculty candidates, and careful evaluation and critique by full-time faculty members). Thies further notes that the current ABA accreditation process provides disincentives to the greater use of adjuncts, including their deflated percentage for purposes of faculty-student ratios and active discouragement for the integration of adjuncts in the first year curriculum. *See id.* at 621.

174. This loss of academic freedom would conceivably pose greater threats to clinical faculty than their doctrinal counterparts because of the former's tendency to use their voices in live controversies with real and often powerful adversaries rather than engage in disagreements in the relatively safe venue of scholarly publications.

175. *See infra* Part III.M.

176. *See* *Sussex Commons Assoc. v. Rutgers*, 6 A.3d 983, 990 (N.J. Super. Ct. App. Div. 2010) (holding that clinic was a public agency and, as such, subject to open access); Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 37 (2000); *Maryland Legislature Blunts Threat to Law Clinic Funding*, ABA NOW (Apr. 7, 2010), <http://www.abanow.org/2010/04/maryland-legislature-blunts-threat-to-law-clinic-funding/>; *see also* Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of*

however, the proposals deserve credit for sparking a national conversation—if not exactly soul-searching inquiry—about what we do in legal academia and why we do it. It is difficult to completely dismiss the notion that the current system may serve the interests of law professors, but it is not serving students. However, the academy should not categorically reject deregulation and experimentation out of fear of the ALDA agenda because the proposed changes may hold the key to some much needed reforms. Instead, despite the very valid concerns, educators should focus on establishing and safeguarding the floor of good educational practices and build in mechanisms to assuage fears about the end of a uniform program of legal education. In truth, even under the current system that strives to impose unified standards, legal education is not uniform. Adaptability is key—not in the regressive manner promoted by the ALDA, but in a manner that incorporates progressive values.

### III. SUGGESTIONS

As outlined above, the current state of legal education demands serious and sustained attention. Legal educators can hand-wring and cling desperately to the old traditions, or they can re-imagine legal education in ways that address its multiple shortcomings. The latter can be achieved by making the instructional process more humane and humanizing, providing better and more relevant training, reducing costs and their concomitant impact on student debt, turning the lasers on ourselves to examine our resistance, and constructing this enterprise as student-centered. A wide range of possibilities exist if faculty push themselves to think outside the box, and here I outline only a few. Professors need to consider options without retreating to the corners of their historically designated roles in the wrestling ring, and without underestimating the forces of resistance.<sup>177</sup>

#### *A. Allow Flexibility for Schools to Reevaluate Institutional Mission*<sup>178</sup>

Law schools could benefit from the latitude to individualize their programs instead of hewing to a uniform model that might be neither appropriate nor achievable for a particular institution. Some deans bristle at the “one size fits all” approach mandated by the current ABA accreditation standards.<sup>179</sup> Admittedly, there are risks associated with looser, more adaptive regulation of legal education, and some critics fear the unintended and potentially regressive consequences of

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*Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 1975 (2003).

177. Sturm & Guinier, *supra* note 40, at 520 (warning that law school “culture is remarkably static, non-adaptive, and resistant to change, even in the face of strong pressure from significant constituents of legal education and evidence that law schools are not fulfilling core aspects of their mission”).

178. Sturm and Guinier note that this is “a time for systemic reflection and for reconstituting the framework and relationships shaping law schools.” *Id.* at 517.

179. Sherwood Ross, *7 Law School Deans Rip Accreditor American Bar Assn.*, *OPEDNEWS* (Dec. 3, 2008), [http://www.opednews.com/populum/print\\_friendly.php?p=7-Law-School-Deans-Rip-Acc-by-Sherwood-Ross-081203-512.html&c=a](http://www.opednews.com/populum/print_friendly.php?p=7-Law-School-Deans-Rip-Acc-by-Sherwood-Ross-081203-512.html&c=a).



experimentation. Deborah Rhode, hardly a voice associated with the reactionary ALDA, has argued in favor of specialized law schools that reflect the reality, needs, and mission of law schools and the communities served by their graduates, noting that different skills are necessary depending on the location and type of practice.<sup>180</sup> This represents another area where faculty should restrain the impulse to reflexively reject innovation simply because it parallels the ALDA position. Clearly, permitting experimentation and deviation from a standardized curriculum could further stratify law schools and legal practice. But if schools are not adequately preparing students to practice law in the venues in which they are most likely to practice, legal institutions are facing increasingly compressed resources, and students are facing increased debt, it is incumbent upon all of legal academia to direct energy and thought into figuring out how to educate students in a way that enables them to service their debt, support their families, and serve their communities, not fund faculty paychecks and research stipends.

Some undeniable logic attends the argument that law schools focused on nuts and bolts practice could reallocate resources to ensure that students obtain the type of skills necessary to flourish in the professional areas commonly represented in the demographics of their graduates. If one concedes the validity of the argument that some scholarship provides little practical benefit to students despite its cost, individual schools could repurpose salary and stipends to those who provide instruction in skills rather than research. Stratification is risky, but perhaps such a model would make law school more broadly accessible, and consequently make lawyers available to a wider swath of the population. This is a worthy goal in light of the prevalence of people dispossessed from the legal system. Although it is easy to see why a bifurcated system is objectionable, the concept deserves discussion, as there may be ways to mitigate those very valid concerns.

Law schools must engage in the careful and perhaps painful process of self-reflection about institutional mission and vision. Not every school can possess a coveted spot in the top tier, and educational programs at lower-tiered institutions should not reflexively try to mimic the programs at those schools and aspire to a standard many schools will never achieve. A reasonable query is why the academy should not allow law schools to recognize and respond to the distinctions that already exist—notably, graduates of prestigious law schools are more likely to work at big firms and enter legal academia; local law schools will more likely produce lawyers who represent individuals within their communities. Law schools should be able to individualize the training to provide the skills

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180. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 190 (2000) (“It makes little sense to require the same training for the Wall Street securities specialist and the small town matrimonial lawyer. While some students may want a generalist degree, others could benefit from a more specialized advanced curriculum or from shorter, more affordable programs that would prepare graduates for limited practice areas.”). *But see* Michael A. Olivas, “*Majors*” in *Law?: A Dissenting View*, 43 HARV. C.R.-C.L. L. REV. 625, 627 (2008) (arguing that Rhode’s proposal would result in further stratification among law schools).

necessary to succeed in a small firm or solo practice.<sup>181</sup> Perhaps some schools should set their sights on serving their communities rather than covet a higher ranking.<sup>182</sup> Schools could be encouraged to follow the example cited by the Carnegie Report, detailing the distinct programs at CUNY and NYU.<sup>183</sup> The Carnegie Report lauds the schools for their ability to “form communities of learning in which the form of curriculum and pedagogy follows, or anticipates, their students’ future professional functions.”<sup>184</sup>

*B. Increase Diversity of Faculty, Students, and the Profession*

Exhortations to increase diversity within law schools and the legal profession elicit little conceptual opposition.<sup>185</sup> However, merely acknowledging the importance of diversity within law schools is insufficient to combat the existing disparities with the intention, determination, and rigor necessary to overcome the barriers to fuller participation. Legal education and the legal profession have witnessed significant progress in eliminating homogeneity, and they are far more representative of the general population than before.<sup>186</sup> Despite very real progress in enhancing the diversity of law schools however, significant obstacles endure.<sup>187</sup> Current minority enrollment in law school is at approximately 20%;<sup>188</sup> African-

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181. Redirecting resources away from scholarly pursuits may ultimately reinforce further stratification because faculty interested in research and writing might migrate to schools that value scholarly output.

182. See Randolph N. Jonakait, *The Two Hemispheres of Legal Education and the Rise and Fall of Local Law Schools*, 51 N.Y.L. SCH. L. REV. 863, 887 (2006-07) (“Local law schools, however, must do more than this to justify their continued existence. The schools need to focus more on training their students to practice and compete better in the small-firm, personal-client sphere where the majority of their graduates will practice.”).

183. CARNEGIE REPORT, *supra* note 2, at 34-45.

184. See *id.* at 43.

185. But see Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2258-59 (2000) (citing studies suggesting that increasing racial diversity within law schools comes with risks, including the increasing balkanization of students of color, which must be weighed against the risks of minority “tokenism”).

186. Whites comprise 90.3% of lawyers, and 69% of lawyers are men. AM. BAR ASS’N, GOAL IX REPORT 2006-2007: THE STATUS OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 5 (2007) [hereinafter GOAL IX REPORT], available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/racial\\_ethnic\\_diversity/credp\\_goal9\\_2007\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/racial_ethnic_diversity/credp_goal9_2007_2011.authcheckdam.pdf); COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2009, at 1 (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/women/reports/CurrentGlanceStatistics2009.authcheckdam.pdf>.

187. Ryan D. King et al., *Demography of the Legal Profession and Racial Disparities in Sentencing*, 44 LAW & SOC’Y REV. 1, 1 (2010) (observing that “the legal profession [is] now more racially and ethnically diverse than at any point in U.S. history”).

188. See LAW SCH. ADMISSION COUNCIL & AM. BAR ASS’N, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2009 EDITION 858-62 (2008). The composition of law school student bodies is not expected to be reflective of the general population any time soon. See ABA



Americans constitute 4.2% of the legal profession (but 12.9% of the population), and Latinos comprise 3.7% of the legal profession (but 12.5% of the population).<sup>189</sup> Women are now well-represented among law students, but they are still underrepresented in the academy and the profession, most notably at the highest levels of practice.<sup>190</sup> Inattention to remediating the factors that obstruct realization of egalitarian and diversity ideals serves to perpetuate the present state of affairs.

This section recognizes an expansive definition of diversity, including not just race and gender, but a host “of social, political, and cultural variations in individuals/groups, including those related to class, national origin, sexual orientation, geographic region, political affiliation, religion, ability/disability and age.”<sup>191</sup> Heterogeneity in law school classes and the profession contributes immeasurably to enriched understanding of the myriad experiences and perspectives that combine and overlap to form the human condition. Because of the historical foundation of race and gender disparities, and because much of the scholarship focuses on these two areas,<sup>192</sup> they will be the primary focus of this section. This decision should not be taken to suggest that these two are the only categories worthy of attention, but instead should be taken as symbolic of a much more inclusive and expansive conception of diversity.

Given the changing demographics of this country<sup>193</sup> and of the legal profession, the cultural changes engendered by globalization require law schools

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*Leadership: Office of Diversity Initiatives*, AM. BAR ASS’N, <http://www.americanbar.org/groups/leadership/diversity.html> (last visited June 9, 2011).

189. GOAL IX REPORT, *supra* note 186, at 5.

190. Deborah Jones Merritt & Barbara F. Reskin, *New Directions for Women in the Legal Academy*, 53 J. LEGAL EDUC. 489, 490-91 (2003) (reporting that a study of hired tenure track and non-tenure track faculty from 1986 to 1991 revealed that “[a]ggressive action . . . was needed just to assure that faculties identified and hired women who were equal to the white men they so readily hired”); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2245-46 (2010); *see generally* Deborah Jones Merritt, *Are Women Stuck on the Academic Ladder? An Empirical Perspective*, 10 UCLA WOMEN’S L.J. 249, 251 (2000) (demonstrating through empirical research that women in general, and particularly those of color, were disadvantaged in the job market in legal academia).

191. Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 3 (2010) (citation omitted). Given the current financial conditions, attention to issues of socioeconomic diversity and its impact on the accessibility of legal education class seems a worthy topic.

192. *See id.* at 4.

193. Barry et al., *supra* note 7, at 62 (citing projections by the U.S. Census Bureau that by 2050 in the United States, the percentages of Caucasians and persons of color will be equal); David Hall, *Giving Birth to a Racially Just Society in the 21st Century*, 21 U. ARK. LITTLE ROCK L. REV. 927, 935 (1999) (suggesting that “by the year 2030, the number of people of color will exceed the number of whites in this country”).

to provide instruction on multicultural competencies.<sup>194</sup> Even the Supreme Court has recognized the importance of diversity in legal education,<sup>195</sup> noting that a diverse class contributes to cross-cultural understanding, preparing students to function in a diverse workforce, and deconstructing stereotypes.<sup>196</sup>

The significance of these issues extends far beyond the confines of legal education to the practice of law as members of an increasingly globalized community. Lawyers will have no choice but to develop multicultural competencies, even if they expect to practice in a narrowly local field or homogenous community.<sup>197</sup> Aside from the intrinsic value of a more diverse bench and bar, diversity within the profession appears to support a more impartial administration of justice,<sup>198</sup> greater perceived legitimacy of our democracy,<sup>199</sup> and

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194. Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 34-35 (2001); see also BEST PRACTICES, *supra* note 3, at 66 (identifying “[s]ensitivity and effectiveness with diverse clients and colleagues” as one of five professional values).

195. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“Our conclusion that the [l]aw [s]chool has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the [l]aw [s]chool’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’” (citation omitted)).

196. *Id.* at 330-31.

197. Deo et al., *supra* note 191, at 7 (“[A] meaningful presence of faculty of color, female faculty, and students of color in the classroom is critical not only for students who find diversity discussions personally significant, but also for every student who wishes to understand how the law develops in a society that is becoming progressively multicultural.”); see also Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 142 (1995) (“[S]ome law students may expect to practice law in a field in which race, gender, sexual orientation, age, religion, physical and mental ability, economic class, and other significant personal characteristics simply do not matter. Thus, a graduate may try to define a narrow legal niche in which he or she can maintain at least the illusion that sensitivity to diverse perspectives is unnecessary for a successful practice of law. However, even those who do not seek to challenge the legal system’s claims of objectivity will find it difficult to deny or escape the cultural pluralism of our national identity . . . .” (internal citation omitted)).

198. See King et al., *supra* note 187, at 26 (noting that after studying the impact of a more diverse bar to the sentencing practices of non-white convicts, the authors concluded “that more racial diversity in the bar results in less racial disparity in criminal sentencing”); see generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (lamenting the dearth of minority judges and positing that a diverse bench and varied perspectives enhance impartiality and public perceptions of fairness); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (arguing that homogeneity undermines the perceived and real legitimacy of the judiciary).

199. Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 77 (2006) (“The visual presence of lawyers of color serving in leadership positions in our democracy assures people of color that they belong to the political community and that their group interests are being represented



the training of lawyers more likely to provide services to underserved communities.<sup>200</sup> The intersection between a heterogeneous student body and advancing justice is critically important. As Anderson notes, if legal education reform directs its attention only to “the curriculum but fail[s] to address who law schools teach and who our graduates serve, we will have missed an opportunity to diversify the profession and renew its commitment to making justice a reality for all.”<sup>201</sup>

Realizing the goal of assembling a diverse student body requires law schools to increase the heterogeneity of the applicant pool. Instead of merely articulating disappointment about the lack of qualified candidates and relying on minimal efforts such as sending out ever-increasing quantities of glossy admissions literature, schools need to dig deeper into the roots of the problem. Some critics argue that one of the most intractable impediments to a diverse student body is a failure to invest in the pipeline process, and law schools are well-situated to make a meaningful contribution to these initiatives.<sup>202</sup> Providing meaningful and sustained support for the pipeline process is a substantial commitment, but most profound problems are not solved without holistic and sustained efforts. Other studies have suggested that initiatives are necessary to enhance diversity within law school and the profession. For example, one report on the disproportionately low representation of Latinas outlined several suggestions, including the implementation of a mentoring program, increasing the visibility of Latina role models, conducting outreach to various community members to fortify the pipeline process, and developing support networks.<sup>203</sup> Additional initiatives included eliminating glass ceilings that penalize women for endeavoring to strike a balance between family and career, as well as drawing attention to the underrepresentation of Latinas in law school and the profession.<sup>204</sup> Little empirical evidence has been gathered to elucidate all the barriers to a diverse academy and profession, heightening the importance of engaging in a systematic study. In the interim, law schools can begin to act on common sense suggestions, gather, share, and analyze data, and expand beyond the nominal efforts that have failed to achieve the objectives of diversifying law school and the legal practice.

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in governmental debates and decisionmaking.”).

200. Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1025 (2009) (“For justice and legitimacy, however, broad access to the profession must be a central concern. The overwhelming whiteness of the profession contributes to a disparity in justice for the poor and disempowered.”).

201. *Id.*

202. Sarah E. Redfield, *The Educational Pipeline to Law School—Too Broken and Too Narrow to Provide Diversity*, 8 PIERCE L. REV. 347, 381 (2010) (“Law schools and the law community, with their institutional infrastructure and systemic connections, have the capacity to craft, support, and sustain successful pipeline interventions before the law school gates, should they have and commit the will.”).

203. HISPANIC NAT’L BAR ASS’N, *FEW AND FAR BETWEEN: THE REALTY OF LATINA LAWYERS* (2009).

204. *See id.* at 7.

Once assembled in school, commentators have suggested various methods of making the entire process of legal education more inclusive and relevant to a diverse student body.<sup>205</sup> Ensuring a diverse faculty is indisputably important—an ideal that is far from the current reality, despite the ABA’s objectives of “[p]romot[ing] full and equal participation in the association, our profession, and the justice system by all persons” and “[e]liminat[ing] bias in the legal profession and the justice system.”<sup>206</sup> The notion that diversity is important merely because it provides role models has drawn fire<sup>207</sup> as critics point out the myriad benefits of a diversified faculty. Despite the value of a heterogeneous faculty, statistics about the presence of women<sup>208</sup> and people of color<sup>209</sup> in the academy are telling. Increasing faculty diversity must be a priority, not merely paying lip service to it. This requires a wide array of initiatives such as paying close attention to how teaching loads are assigned.<sup>210</sup> Further examples include expanding conceptions of valued scholarship to include critical and interdisciplinary theories, analyzing whether women and minority faculty fare worse in teaching evaluations than their

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205. One professor suggests the following methods: “[m]ake classrooms welcoming”; “[a]ssign minority and white women faculty to teach in the first year”; “[r]equire a pedagogy that does not have a demonstrated bias”; “[e]liminate letter grades, relying upon a pass/fail system”; and “[e]ncourage faculty to utilize take-home exams.” Morrison Torrey, *Actually Begin to Satisfy ABA Standards 211(a) and 212(a): Eliminate Race and Sex Bias in Legal Education*, 43 HARV. C.R.-C.L. L. REV. 615, 616-17 (2008).

206. *Diversity*, AM. BAR ASS’N, <http://www.americanbar.org/portals/diversity.html> (last visited June 10, 2011).

207. Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S L.J. 93, 98-99 (1990).

208. One report found that 36.9% of all law faculty are women. *2007-2008 Association of American Law Schools Statistical Report on Law Faculty*, ASS’N OF AM. LAW SCH., <http://www.aals.org/statistics/2008dlt/gender.html> (click “Gender and Age” hyperlink) (last visited June 10, 2011). That number drops when calculating the percent of tenure track or tenured women, which falls to 30.4% women. *Id.* (click “Job Security” hyperlink); see also ASS’N OF AM. L. SCH., ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS 4-5 (2005-06), available at <http://www.aals.org/documents/statistics/20052006statisticsonlawfaculty.pdf> (showing that 81.2% of deans, 63.6% of associate deans with professor title, 74.1% of professors, 55.2% of associate professors, and 54.9% of assistant professors are male).

209. Only 15.2% of faculty were identified as non-white. *2007-2008 Association of American Law Schools Statistical Report on Law School Faculty*, *supra* note 209 (click “Race and Ethnicity” hyperlink).

210. Faculty candidates and those under review who are not of the dominant culture may face challenges. For example, evidence suggests that women and faculty of color fare worse in teaching evaluations than their white male counterparts, and progressive and critical scholarship agendas may not be as well-received. Moreover, women may be assigned to teach classes considered “soft.” See, e.g., Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 305, 314 (2004) (arguing that “[g]enerally, female law professors disproportionately teach courses that can be described as more ‘feminine,’ softer, less hard core, and often perceived as less prestigious”).



white male counterparts, and exploring and dismantling other impediments to a full representation in the academy. In addition to a representative faculty, other suggestions exhort professors to attend to the classroom dynamics that alienate students hailing from diverse backgrounds.<sup>211</sup>

Despite the discomfort associated with raising issues of race, gender, and diversity more generally, professors should be encouraged to confront and address these issues, as they are often central to a complete discussion of the context of cases.<sup>212</sup> One critic concluded that “white males tend to exclude and avoid discussions regarding race and gender, while female faculty and faculty of color tended to engage in diversity discussions. As a whole, students prefer classroom discussions that include race and gender issues as means of illuminating how the law affects people differently.”<sup>213</sup> Compounding the

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211. See Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 389 (2006); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 AM. U.J. GENDER SOC. POL’Y & L. 511, 572 (2005) (arguing that eliminating “the Socratic method or hiring more female faculty will not alone end gender differences or address likely underlying causes. Rather, the problems with the current legal education that cause gender differences are likely far more nuanced—part curricular, part pedagogical, part cultural, and part social—and their effect on gender is only one of many harmful manifestations. . . . This search for underlying causes will require that the law school community discuss and grapple with the missions and methods of legal education more generally.”); see also Felice Batlan et al., *Not Our Mother’s Law School?: A Third-Wave Feminist Study of Women’s Experiences in Law School*, 39 U. BALT. L.F. 124, 128, 147 (2009) (noting that a review of the literature over the last twenty-five years generally “conclude[s] that women are much less satisfied with their law school experience than men and often experience deep feelings of alienation while in law school” and recommending that law schools “provide more female mentors for the student body”). The authors do, however, laud the end of the discrepancy in achievement between men and women, noting that in some instances, women have begun to outperform men. *Id.* at 128-29. But see Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299, 301, 327 (2003) (arguing that gender is not dispositive in dictating student experience, but rather that the problem is attributable to “the persistence of an underlyingly male approach to legal education,” and concluding that there has been “a shift from a law school experience that is entirely gendered to one characterized by a combination of both a gendered and a ‘standard’—that is to say, traditionally male—law school experience”).

212. See generally Johanna K.P. Dennis, *Ensuring a Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 TEX. WESLEYAN L. REV. 613 (2010) (exhorting legal educators to integrate multicultural educational experiences throughout the curriculum).

213. Deo et al., *supra* note 191, at 37; see also Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1234 (2010) (stating that contrary to what anti-affirmative action advocates argue, students of “underrepresented minority students in ‘meritocracy’ states must endure silencing, imposition, and performing in white spaces at a far greater rate than their counterparts in race-based admissions states”).

tendency of some faculty to skirt difficult topics is that specific language choices can be alienating for those not in the cultural majority. For example, one theory suggests that the neutral language of law affects students differently based on their race and gender.<sup>214</sup> Failure to interrogate these issues risks the continued alienation of women and those in the cultural minority and misses an important opportunity to broaden the students' understanding of the real and perceived biases embedded in the law and legal institutions.<sup>215</sup> Attention to these issues benefits not only those who are alienated by a more circumscribed and decontextualized conversation, but the entire law school population.<sup>216</sup> The above suggestions can be expanded to apply to issues of race, class, and diversity more generally.<sup>217</sup> The best intentions of diversifying law school and the legal

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214. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 6 (2007) ("[L]earning the apparently neutral language of the law appears to have different effects on students of different races, genders, and class backgrounds.").

215. Discord exists among feminist thinkers about gender-based reforms to legal education. Caitlin Howell outlines the arguments aimed at combating the marginalization of women in law school and has enumerated various feminist proposals to counteract the inherent bias. See Caitlin Howell, *Combating Gender Inequities in Law School: Time for a New Feminist Rhetoric That Encourages Practical Change*, 4 MOD. AM. 36 (2008). These include "inserting gender and feminist perspectives into first year classes, such as torts and contract law," employing feminized teaching methodologies, "[h]umanizing law school . . . [by] fostering an ethic of care in the classroom," and examining "the concept of gender as the consequence of the power structure of law school." *Id.* at 36-37. Howell argues that this focus on gender is misplaced and encourages legal reform that does not rely on gender stereotypes. See *id.* Others have outlined the risk of focusing on the impact of law school on women. See, e.g., Jennifer L. Rosato, *The Socratic Method and Women Law Students: Humanize, Don't Feminize*, 7 S. CAL. REV. L. & WOMEN'S STUD. 37, 39 (1997) (cautioning against a "women-friendly" approach, concerned that the implicit message is that woman are unsuited to the demands of the law school experience). Other critics note that female professors are assigned less respected course loads. See, e.g., Kornhauser, *supra* note 210, at 314.

216. See Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 WM. & MARY J. WOMEN & L. 795, 797 (2007) ("After writing several articles addressing gender and legal education, I have come to the realization that even though female students were subjected to a greater quantity (and sometimes different quality) of negative law school experiences, substantial numbers of men are also being deprived of a quality legal education. Apparently law school is a positive learning experience for hardly anyone!" (internal citation omitted)).

217. For a discussion of how the current admissions practices, while facially neutral, impede the diversification of law schools, see Leonard M. Baynes, *Introduction: The LSAT*, U.S. News & World Report, and *Minority Admissions*, 80 ST. JOHN'S L. REV. 1 (2006) (providing an overview of the articles outlining the adverse impact of LSAT scores on admissions); Pamela Edwards, *The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 ST. JOHN'S L. REV. 153 (2006); Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41 (2006). There is a documented racial disparity in LSAT performance. See LAW SCH.



profession will be circumvented unless the existing structural impediments to full participation are identified and eliminated. This cannot be a passive endeavor; it demands attention, energy, and resources.

*C. Encourage Student Well-Being Through Self-Awareness  
and Self-Reflection*

Law students are expected to assimilate seamlessly into a culture that privileges and rewards a discrete set of skills and a particular temperament that tolerates conflict and stress. The attributes valued and validated in law school tend to focus on the analytical and linear while subverting creativity and communitarian ideals.<sup>218</sup> Law schools make little effort to cultivate awareness of each student's strengths and preferences. Instead, law school tends to value and reinforce the set of skills that allowed law professors to rise to the top of their fields. Rather than force students to conform their constellation of strengths and values to those reflected in the dominant paradigm, law schools should structure opportunities for students to explore self-knowledge and instill habits of self-reflection. This habit should begin when students first arrive during orientation<sup>219</sup> and then be revisited repeatedly throughout law school.<sup>220</sup> Many clinics enhance discussions and self-awareness by utilizing testing such as Myers-Briggs<sup>221</sup> to help students identify personality types, motivated by the assumption that students will experience more professional satisfaction if they make informed

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ADMISSION COUNCIL, MINORITY DATABOOK 14 tbl.IV-1 (2002) (noting that the average LSAT score for African-American students over a seven-year period was 141 to 142; for Native Americans, 147 to 148; for Asian-Americans, 150 to 151; for Caucasians, 151 to 152; for Hispanics, 146 to 147; for Mexican-Americans, 146 to 147; and for Puerto Ricans, 137 to 138). For a discussion of the staggering cost of legal education, which necessarily reduces opportunities based on class, see *infra* Part III.K. See, e.g., Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 853 (2010) (arguing that schools may constitutionally employ race-conscious and race-exclusive aid as methods of diversifying student body).

218. David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61, 98 (1994) ("Legal instruction teaches students to exercise rational, critical judgment and exalt logic over other values, such as emotional sensitivity.").

219. See generally Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327 (2008).

220. See Allison D. Martin & Kevin L. Rand, *The Future's So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 DUQ. L. REV. 203, 218 (2010) ("[L]egal educators can play an important role in maintaining and creating hope in law students by enhancing the components of hope: goals, pathways thinking, and agentic thinking. Based on these components, we have created five principles of engendering hope in law students: (A) help them formulate or reframe goals; (B) increase their autonomy; (C) model the learning process; (D) help them understand grading as feedback rather than as pure evaluation; and (E) model and encourage agentic thinking.").

221. *MBTI Basics*, MYERS & BRIGGS FOUND., <http://www.myersbriggs.org/my-mbti-personality-type/mbti-basics/> (last visited June 10, 2011).

choices about practice based on self-awareness. Recognizing different areas of strength and personality types, even if they are not those rewarded in the traditional classroom teaching methodologies, may serve to anchor students to their value and sense of self-worth even in the face of less than stellar performance in other areas.

To ameliorate student distress, law schools should integrate sound psychological principles into their pedagogical practices. As with most disciplines, the study of psychology has evolved, providing new insights. A development that holds particular promise in palliating law school distress is the field of positive psychology, based on the notion that “to understand the human condition, we should study not only mental illness and distress but also the conditions that lead to optimal functioning.”<sup>222</sup> Recent proponents of positive psychology include Todd and Elizabeth Peterson, who argue that past proposals for curricular reform aimed at addressing student distress are likely to generate controversy within the academy, as they are perceived by some faculty as requiring deviation from the traditional law school educational mission.<sup>223</sup> Instead, they suggest strategies derived from the precepts of positive psychology and note that these might be more palatable than some proposals for radical reform, as they would “not require a complete overhaul of the law school curriculum.”<sup>224</sup>

Another example of engendering positive health is one professor’s efforts to integrate hope theory, a subset of positive psychology, in the first year writing curriculum.<sup>225</sup> Hope theory holds that students fare better when they are: focused on learning objectives rather than fixated on specific performance goals, the latter of which are imposed externally; urged to formulate concrete rather than abstract goals; and encouraged to work towards rather than avoiding a particular outcome.<sup>226</sup>

Even if legal education refuses to budge, sound psychological practices can be incorporated into the existing structure to counteract the disempowering dynamics of law school. Schools should make a commitment to consciously focus on empowering and enlightening students and promoting self-awareness to inoculate students against stress, depression, and alienation.

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222. Peterson & Peterson, *supra* note 65, at 362.

223. *See id.* at 361.

224. *Id.*

225. *See generally* Jamie R. Abrams, *A Synergistic Pedagogical Approach to First-Year Teaching*, 48 DUQ. L. REV. 423 (2010).

226. *See* Martin & Rand, *supra* note 220, at 218.



*D. Rethink Summative Assessment, Mandatory Grading Curves, and Class Rank*<sup>227</sup>

Given the stakes for students, law schools should eschew the reliance on summative assessments, mandatory grading curves, and class rank. Employers would surely object to a system that required them to expend more energy to sort students, but if all law schools adopted a system that presented a more holistic review of student competencies, employers might come to believe that this system ultimately enabled them to make better hiring decisions.<sup>228</sup> Law school seems to foster a belief by some students that good jobs<sup>229</sup> are only available to those in the top 10% of the class, yet hard reality dictates that 90% of the students will not realize that goal, and the ensuing pressure can be demoralizing.<sup>230</sup>

Mandatory grading curves foster an inherently competitive environment. Arguably, the competition imposed by mandatory grading curves mirrors pressures in the “real” world. Perhaps that is precisely the reason to modify or jettison the reliance on competition. Students could instead be encouraged and rewarded for collaborating, allowing them all to achieve good grades rather than doling out grades based on a comparison to their cohort, premised on the theory that objective rather than comparative mastery of the material is paramount.<sup>231</sup> Promoting the acquisition of collaboration skills as a byproduct would also be a welcome development that reflects the realities of practice. Perhaps if the ethos of collaboration were nurtured instead of extinguished in law school, it would be more prevalent and visible in practice. Law school lags far behind the practice of law in cultivating an awareness of the importance of collaboration and instruction in that and other skills necessary to solve problems.

A few schools have eliminated numerical grading and class rank, although

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227. This type of reform will require lower-tier law schools to become less risk-averse, but with that risk comes opportunity. Instead of genuflecting to the *U.S. News and World Report* rankings, schools can set their sights on a better system of assessment. Law schools themselves could model introspection and an honest assessment of their strengths and gear their educational program to the needs of their student body. This could include producing lawyers who primarily practice in small or solo practices and acknowledging that they are not training future law professors if that is not the likely career trajectory of their graduates.

228. Some schools have eliminated numerical grading and class rank, although some of these tend to be the types of schools in which employment is not ever really in question. See *infra* note 232.

229. This is another instance wherein the groupthink mentality for some students can distort their own priorities and lead them to believe that the “good jobs” are those defined by high status and salaries, rather than a determination of the best fit for each student based on circumstances, preferences, values, and skills.

230. Daisy Hurst Floyd, *We Can Do More*, 60 J. LEGAL EDUC. 129, 130 (2010) (“Unfortunately, legal education defines the prizes as goals that cannot be achieved by most of our students. If winning is defined by being in the top 10 percent of the class, then 90 percent of our students are set up for failure from the beginning.”).

231. See Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 781 (2004).

many of these tend to be the types of schools in which employment is not ever really in question.<sup>232</sup> The use of narrative evaluations rather than numerical grades answers many concerns: they provide formative feedback (even in end of semester, high-stakes tests, students are given the tools to understand retrospectively what they did well and what they did not); eliminate the need for, and mechanism supporting, mandatory curves and class rank; and provide employers with a far more comprehensive and holistic view of a student's abilities.<sup>233</sup> Alternative schemes are already in place in select institutions. With the explicit goal of encouraging cooperative learning, for example, Northeastern University School of Law utilizes written evaluations that provide meaningful feedback about test performance but do not pit students against each other with mandatory curves.<sup>234</sup> This system necessarily dispenses with class rank because it is impractical to make comparisons of narrative assessments.<sup>235</sup>

Short of radical reform, professors can implement adjustments that blunt the deleterious impact of high-stakes testing. One suggestion is to require professors to give midterm exams in the first year courses and provide students with individualized narrative feedback, even if the interim results are not included in the final grade.<sup>236</sup> Similarly, practice multiple choice quizzes may help prepare students for the bar, even if they are not calculated into the students' GPAs. Professors have created ways to overcome the deterrents to providing corrective feedback in large classes,<sup>237</sup> including assigning students to at least one small

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232. See *Degree Requirements*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/academics/curriculum/degree-requirements.html> (last visited June 10, 2011) (using narrative evaluations instead of numerical grades); *Grades*, YALE LAW SCH., <http://www.law.yale.edu/academics/jdgrades.htm> (last visited June 10, 2011) (using modified pass/fail grading system); *Grading Policy*, BERKELEY LAW, [http://www.law.berkeley.edu/students/career\\_services/foremployers/grading.html](http://www.law.berkeley.edu/students/career_services/foremployers/grading.html) (last visited June 10, 2011) (same); *Policies*, U. OF CHI. LAW SCH., <http://www.law.uchicago.edu/employers/policies> (last visited June 10, 2011) (using a scaled grading system instead of GPA system and not ranking students); *Requirements for Graduation and Good Academic Standing for the J.D. Program*, U. OF NOTRE DAME LAW SCH., <http://law.nd.edu/current-students/bulletin-of-information/requirements-for-graduation-and-good-academic-standing-for-the-j-d-program/> (last visited June 10, 2011) (using the regular grading system, but not ranking students); *Requirements for the J.D. Degree*, HARVARD LAW SCH., <http://www.law.harvard.edu/academics/handbook/rules-relating-to-law-school-studies/2010-2011-requirements-for-the-j.d.-degree-.html#J.GradesforJ.D.Students> (last visited June 10, 2011) (using a pass/fail system); *Stanford Law School Grading System*, STANFORD LAW SCH., [http://www.law.stanford.edu/experience/careers/ocs/students/resources/pdf/Grading\\_System\\_Explanation.pdf](http://www.law.stanford.edu/experience/careers/ocs/students/resources/pdf/Grading_System_Explanation.pdf) (last visited June 10, 2011) (same).

233. Implementing such a system would require a reallocation of faculty resources and a reorientation of priorities, as well as rethinking the curriculum to make it more amenable to narrative and frequent assessments.

234. *Degree Requirements*, *supra* note 232.

235. *Id.*

236. Schuwerk, *supra* note 231, at 782.

237. See Schwartz, *supra* note 84, at 370 (suggesting that law schools adopt "computer



section and eliminating grades in the first semester.<sup>238</sup> Finally, schools could develop systems of recognizing excellence in areas outside of grade point average, such as intramural competitions, seminars, and pro bono activities. This would serve to emphasize and reinforce other important measures of participation in law school culture and the value of alternative methods of preparing to practice law. Further, schools could work to limit the primacy of grades in the distribution of other resources within the school, such as law review and interscholastic competitions.<sup>239</sup>

### *E. Restructure the Bar Exam*

A frequently cited argument in favor of high-stakes exams is that they are similar to the conditions presented by the bar exam. This argument is an instance of the tail wagging the dog, since the bar exam has been excoriated by critics for its near complete irrelevance to the actual practice of law,<sup>240</sup> and few believe that this test adequately measures the competencies necessary to practice.<sup>241</sup> Instead

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programs [to] allow faculty to administer short answer and multiple-choice assessments to their students on-line” and encouraging professors to “use self-, peer-, and small group-grading”). Even if these measures are not implemented across the board, schools could assign students to at least one small course in the first year, which would be conducive to more individualized feedback. *See, e.g.,* Bruce R. Jacob, *Developing Lawyering Skills and the Nurturing of Inherent Traits and Abilities*, 29 STETSON L. REV. 1057, 1071 (2000) (“In some law schools, each first-year student is placed in at least one small enrollment section of a basic course, e.g., Contracts, Torts, or Real Property. In a section with twenty-five or fewer students, writing assignments periodically can be given.”).

238. *See* Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DEPAULL. REV. 851, 897-99 (2009) (arguing that grading curves and summative assessments dampen enthusiasm for law school, which negatively impacts the quality and effectiveness of legal education, and suggesting alternatives such as dispensing with grading for the first semester of law school).

239. Schuwerk, *supra* note 231, at 789-90.

240. *See, e.g.,* Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Should Change*, 81 NEB. L. REV. 363, 364 (2002) (“[T]he entire process used to select lawyers—from the Law School Admission Test (LSAT), through law school, and up to the bar exam—overemphasizes some skills and completely disregards others.”); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 433 (2003); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1193 (1995).

241. Keating, *supra* note 104, at 172 (“While law school tests attempt to measure issue-spotting and legal analysis—two skills that are certainly important to the practice of law—real law practice generally allows a lawyer the luxury to ruminate on a client’s problem for more than just three hours.”); Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 TEMP. L. REV. 69, 72 (2003) (“There is a multiplicity of skills not assessed on a blue book exam that can be found in outstanding lawyers in practice. Key skills such as the ability to counsel troubled clients, negotiate favorable settlements, and be persuasive

of working backwards from a flawed licensing system, those in the profession should instead advocate for a reformation of the bar exam under a methodology that reflects and assesses the skills commonly employed by competent and ethical attorneys. The current system parallels concerns articulated about “teaching the test” that some educators feel has eviscerated creativity in public school curricula.<sup>242</sup> As a result of this pressure, the focus of the curriculum and teaching methodologies is often directed to passage rates rather than critical legal education and instruction in a broad array of skills and competencies. I am not suggesting that schools or their accrediting agencies should unleash all students who have earned a J.D. to practice law without demonstrating proficiency in an enumerated list of competencies, but instead that the existing paradigm of legal education and licensing assessment does not serve those ends.<sup>243</sup>

Law schools do have an affirmative duty to prepare students to pass the bar examination, and concerns about bar passage rates are legitimate. However, allowing bar passage concerns to drive the curriculum, grading methodologies, and academic standards is shortsighted and counterproductive to the goal of producing competent practitioners. This is particularly true when some of the conventional wisdom about bar passage is belied by the facts. For example, an empirical study demonstrated that taking substantive bar courses in the upper-level curriculum did not correlate with a higher bar passage rate for the lowest quartile of the class, those considered at highest risk for failing the bar.<sup>244</sup> This conclusion does not support the frequent admonitions that lower-performing students should be channeled into substantive bar courses.<sup>245</sup> For schools in lower tiers with serious concerns about bar passage rates, a low passage rate can prompt faculties to enact reactionary (and potentially punitive) measures instead of engaging in comprehensive self-assessment and reform. Harsher grading systems aimed at identifying underperforming students and directing them to supportive services is justifiable if the remedy is to actually guide students to adequately resourced and easily accessible academic success programs with a proven record of success. However, if the unspoken but real goal is to weed out students who may lower a school’s already problematic bar passage rate, perhaps the schools should be encouraged to develop a better mechanism for identifying students who are likely to succeed—instead of accepting students whose future success they may question—to fill seat with tuition-paying students.<sup>246</sup> Instead of

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to a jury are not assessed.”).

242. Janice Gross Stein, *Law and Education: The Practice of Accountability*, 14 EDUC. & L.J. 1, 4 (2004).

243. See Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 69-70 (2007).

244. See Douglas K. Rush & Hisako Matsuo, *Does Law School Curriculum Affect Bar Examination Passage? An Empirical Analysis of Factors Affecting Bar Examination Passage During the Years 2001 Through 2006 at a Midwestern Law School*, 57 J. LEGAL EDUC. 224, 225 (2007).

245. *Id.* at 225-26.

246. Sober lessons are presented by an ominous trend at high schools concerned about their



externalizing blame by bemoaning student performance, work ethic, and study habits, schools should closely analyze their teaching methodologies. Fairly mild adjustments may usher in measurable improvements such as incorporating frequent practice essays with prompt and detailed feedback and providing free bar preparation courses as a short-term fix. Unfortunately, in the absence of other reforms, imposing more rigidly enforced academic standards is likely to negatively impact diversity within the student body and, ultimately, the profession.

Various proposals set forth alternatives to the bar exam that are more closely calculated to assess skills that are necessary in lawyering.<sup>247</sup> One widely discussed option is a post-graduate apprenticeship, or at least a “mandatory period of supervised practice before full admission to the legal profession.”<sup>248</sup> The demands of requiring a structured apprenticeship could present seemingly insurmountable logistical and quality control concerns, and the costs associated with such a model would only serve to exacerbate student debt if they are not offset in some way. However, the idea should not be dismissed without a careful consideration of creative ways to construct such a program in a cost-effective manner.

Another proposal envisions a tripartite evaluation process: the first step involves an evaluation of common law knowledge; the second phase requires application of this knowledge to more complicated problems; and the third component consists of an assessment of the integration of skills and professional values.<sup>249</sup> This process would be completed two years after graduation from law school and would result in full licensure.<sup>250</sup> Alternatively, graduates could be required to pass a bifurcated bar exam, with the first part testing analytical thinking and traditional doctrinal subjects after the completion of the first year of law school and the second part taken after the third year, assessing a broader range of skills.<sup>251</sup> An alternative method of ensuring that students develop competencies in lawyering tasks beyond those tested by the bar is mandatory

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testing outcomes, particularly when they are tied to funding. Some schools have been accused of increasing expulsion rates and discouraging attendance for students expected to underperform in order to report more favorable test results. See generally William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 585 (2006); Madeline E. McNeeley, *Title IX and Equal Educational Access for Pregnant and Parenting Girls*, 22 WIS. WOMEN’S L.J. 267 (2007); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004). While these heavy-handed but shortsighted and dishonest tactics may assist test results in the short term, they exact a considerable long-term price, particularly to those students deemed unworthy or incapable of redemption.

247. See BEST PRACTICES, *supra* note 3, at 9 n.21.

248. *Id.* at 9.

249. *Id.* at 10.

250. *Id.*

251. Wegner, *supra* note 172, at 640-41.

clinical education.<sup>252</sup> These proposals can be summarily rejected as impractical, costly, radical, and irrelevant, but the arguments seem primarily based on antiquated custom and logistical challenges that should not justify refusing to reconsider the current, deeply flawed system. In the end, the structural barriers erected by the current system reverberate backward to the admissions process, its reliance on the LSAT,<sup>253</sup> and its presumed value in predicting bar passage. These factors render legal education inaccessible to many potentially talented, ethical, empathic, and zealous students who are edged out only by the narrow focus of our licensing system, not based on their potential to contribute to the legal marketplace specifically (and justice, more expansively).

#### *F. Encourage Curricular/Teaching Innovation*

Professors should be encouraged to experiment with curricular innovation designed to meet any number of goals not typically addressed under the “signature pedagogy.” Because most law professors model their teaching on the instructional methodologies they experienced in law school, they have little exposure to pedagogical advances. In replicating the same teaching methodology without critical reflection, legal educators fail to consider and incorporate important pedagogical breakthroughs, including but not limited to those identified by John Dewey and experiential learning,<sup>254</sup> Donald Schön’s insights about the reflective practitioner,<sup>255</sup> and Howard Gardner’s recognition of multiple intelligences.<sup>256</sup> A group of forward-thinking educators is collaborating on a project designed to overcome some of the barriers to pedagogical reform. Legal Education Analysis and Reform Network (LEARN) is comprised of “ten law schools [that] have come together to work with the Carnegie Foundation to promote thoughtful innovation in law school curriculum, pedagogy and assessment.”<sup>257</sup> Recognizing that doctrinal law professors do not spend much

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252. See Stephen Ellmann, *The Clinical Year*, 53 N.Y.L. SCH. L. REV. 877, 891 (2008-09) (“The clinical year speaks to all elements of the legal education apprenticeship, but does so in a way that may seem surprisingly obvious—namely, by making the third year something quite close to explicit apprenticeship.”).

253. See *About the LSAT*, LSAC, <http://www.lsac.org/JD/LSAT/about-the-LSAT.asp> (last visited June 10, 2011).

254. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916); JOHN DEWEY, *HOW WE THINK* (1910); JOHN DEWEY, *HUMAN NATURE AND CONDUCT* (1922); JOHN DEWEY, *MY PEDAGOGIC CREED* (1897); JOHN DEWEY & EVELYN DEWEY, *SCHOOLS OF TOMORROW* (1915).

255. See, e.g., DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* (1987); DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

256. See, e.g., HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983); HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993).

257. LEGAL EDUC. ANALYSIS & REFORM NETWORK (LEARN), *GENERAL DESCRIPTION OF PLANNED PROJECTS 10* (2009-10), available at [http://www.law.stanford.edu/display/images/dynamic/events\\_media/LEARN\\_030509\\_lr.pdf](http://www.law.stanford.edu/display/images/dynamic/events_media/LEARN_030509_lr.pdf).



time discussing, ruminating, or writing about pedagogy, LEARN aspires to create an accessible platform to advance pedagogical developments within the academy.<sup>258</sup> Among LEARN's goals are promoting the teaching innovations that are often unacclaimed and disseminating information about these creative approaches to other law schools and professors.<sup>259</sup> In so doing, LEARN hopes to discredit the notion that an innovative curriculum is less rigorous than its Socratic predecessor or inherently anti-intellectual; to share ideas so that schools are not compelled to reinvent the wheel when considering changes; and to engage in methodical reflection and mutual assessment about the efficacy of these new teaching tools.<sup>260</sup> LEARN's approach is to encourage collaboration and create alliances among the great minds and talented teachers from across the curriculum to integrate the best of legal pedagogy and to bolster the legitimacy and momentum of reform by demonstrating all the ways it is currently happening.<sup>261</sup> The project initially started in small working groups but intends to expand its reach, ultimately creating an inclusive network of educators and law schools determined to identify the best way to train future lawyers, not cling uncritically to tradition.<sup>262</sup> This effort typifies the attitudes espoused by many clinical educators, who eschew proprietary approaches to innovation and foster generous and collaborative endeavors whose shared objective is to bring everyone forward together.<sup>263</sup>

Multiple avenues are available to develop creative curricula that help to engage the students' hearts and minds and to cultivate empathy, an essential ingredient for compassionate and effective problem solving and other important but intangible competencies. A few examples illuminate the range of creative possibilities. Herb Eastman asks students to draft a social justice complaint—one that refuses to delimit a complaint to the legally salient, emotionally detached and decontextualized facts, but rather is written passionately, integrating broad social justice themes and narrative.<sup>264</sup> His unconventional approach forces students to situate their clients' legal issues in their social, political, historic, and economic context, and to craft narrative that speaks not just the sophisticated players in the legal system, but to the clients as well.<sup>265</sup> Recognizing the numbing impact of Socratic dialogue and exhibiting concern about the its effect on students' commitment to public interest work, Nisha Agarwal and Jocelyn Simonson

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258. *Id.* at 16.

259. *Id.* at 14.

260. *See id.* at 22.

261. *See id.* at 13.

262. *See id.* at 20.

263. Although unstated, a secondary benefit is decreasing the risk associated with innovation, as there is safety in numbers.

264. *See generally* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 769 (1995).

265. Derek W. Black, *Turning Stones of Hope into Boulders of Resistance: The First and Last Task of Social Justice Curriculum, Scholarship, and Practice*, 86 N.C. L. REV. 673, 693-95 (2008); *see also* Eastman, *supra* note 264, at 788 (example of a "thick pleading").

describe a summer program at Harvard designed to immerse students in the theories underlying public interest work by coupling an internship experience with a seminar devoted to identifying and interrogating the work they do on-site at public interest organizations.<sup>266</sup>

Laurie Moran and Susan Waysdorf describe the development of a new type of hybrid course that seamlessly integrates a doctrinal class with a compelling service learning component.<sup>267</sup> In this course, the students were exposed to the structural underpinnings of the geography of poverty in post-Katrina New Orleans and then traveled there to provide hands-on service grounded in a deep understanding of history and context.<sup>268</sup> Other professors are humanizing teaching in large classroom settings,<sup>269</sup> expounding on the methods and benefits of the problem method,<sup>270</sup> heeding the importance of classroom architecture and atmospherics,<sup>271</sup> and ameliorating the pressure of first year classes by organizing students into small law firms in which they can navigate the process of answering questions with reduced stress.<sup>272</sup>

In order to encourage faculty experimentation, schools can reduce any perceived risks associated with deviating from the norm, so long as the efforts are reasonably calculated to achieve certain outcomes. For example, schools could minimize the importance of course evaluations in the initial phases of piloting new methodologies, develop evaluation instruments that are better designed to

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266. See generally Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE 455 (2010).

267. Laurie Moran & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum: Expanding Opportunities for the Ethical-Social Apprenticeship* (unpublished manuscript), available at [http://www.nyls.edu/user\\_files/1/3/4/15/1009/THE\\_SERVICE\\_LEARNING\\_MODEL\\_IN\\_THE\\_LAW\\_SCHOOL\\_CURRICULUM0901101.pdf](http://www.nyls.edu/user_files/1/3/4/15/1009/THE_SERVICE_LEARNING_MODEL_IN_THE_LAW_SCHOOL_CURRICULUM0901101.pdf) (last visited June 10, 2011).

268. *Id.* at 2-3. Similarly, I have developed some independent studies that are partnerships with non-governmental organizations to combine student research with the needs of under-resourced organizations. Students were very engaged in the legal issues and derived a sense of satisfaction about the real-life impact of their work.

269. See generally Justine A. Dunlap, "I'd Just As Soon Flunk You As Look at You?" *The Evolution to Humanizing in a Large Classroom*, 47 WASHBURN L.J. 389 (2008) (describing various techniques to humanize large classroom teaching); Paula Lustbader, *Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice*, 4 SEATTLE J. SOC. JUST. 613 (2006) (promoting a learning environment that encourages justice).

270. See generally Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1 (2009) (arguing that problem-based learning allows doctrinal professors to integrate critical pedagogies).

271. Sturm & Guinier, *supra* note 40, at 531. The architecture of the traditional classroom focuses on the front of the room, which funnels authority to the professor facing the class, a design that affects the classroom dynamics. *Id.* In contrast, clinic seminars are often structured so that students are all seated at the same height in a circle, creating a more collaborative learning environment.

272. See Schuwerk, *supra* note 231, at 790-95.



assess efficacy in teaching that integrates non-traditional goals, and otherwise encourage innovation. This would be especially important for faculty in the pre-tenure years. Schools can send the clear message that diverging from standard practice and reflecting on the results, based on sound pedagogy, is welcome, encouraged, and even rewarded. Another option is to assign lighter course loads and committee work to professors who are teaching classes that incorporate more labor-intensive, skills-oriented methods, thereby offering an incentive. Creative approaches would only serve to enhance instruction in a broad range of skills.

### G. Provide Mentoring<sup>273</sup>

Faculty obligations to students should entail more than just shepherding them through the mastery of substantive and procedural law and techniques of argument. More expansively, professors can guide students' entry into the world of legal professionals, a concept characterized by Robert Schuwerk as "stewardship of the *practice* of law."<sup>274</sup> The nature of the relationship between law students and faculty is inherently hierarchical, partly because of the real knowledge and experience gap that separates them, and partly due to the unequal dynamic that attends the student-professor dyad.<sup>275</sup> Despite this intrinsic and unavoidable power imbalance, students benefit from personal connections with professors, and they often relish opportunities to interact in a less formal manner than the classroom typically allows.<sup>276</sup> To be blunt, especially because tuition dollars pay faculty salaries, our obligation to nurture students should not end at the office door. Professors should be accessible for more than just a study question posed during office hours and limited to the substantive topic that arose in the classroom. Instead, faculty should immerse themselves in a vibrant learning community<sup>277</sup> and seek out opportunities to engage in meaningful

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273. Women mentors help students normalize their responses to law school stress and feelings of alienation. See Batlan et al., *supra* note 211, at 148 (arguing that women mentors would "allow[] women to shape a space in which to recognize that their feelings of distress are neither isolated nor unusual").

274. Schuwerk, *supra* note 231, at 754 (emphasis added).

275. *Id.* at 758-61.

276. Many schools have developed mentoring programs that partner with attorneys from the local bar, but these programs have to be thoughtfully administered and consist of more than just a hands-off approach to matching up students. Instead, programs should involve structure, guidelines, and monitoring to ensure the best experience for students and the ongoing participation of the local bar. See Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 128 (2007) ("A well designed formal mentor program that successfully combines the talents and skills of a mentor with a strong seminar component can foster . . . principles [of professionalism] for the newest generation as well as older ones."); see generally Melissa H. Weresh, *I'll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 337 n.1 (2009) (encouraging new and experienced lawyers to work together to "enhance professionalism in the legal community").

277. Faculty members will understandably have different sensibilities, comfort levels, and

interactions outside the classroom<sup>278</sup> in ways that foster the modeling and transmission of professional values. The level of commitment and structure of interaction can vary from fairly low-demand advising programs to more sustained and structured interactions.<sup>279</sup> Unfortunately, professors do not typically conceive of mentoring as within their job description.<sup>280</sup> Some faculty members who entered the academy with complete comfort about the hierarchy or rigid boundaries may feel unsettled by exchanging more than superficial pleasantries with their students, or they may feel constrained by other considerations to limit the time they spend with students. However, establishing relationships also enables faculty to serve as a resource to identify and support struggling students. While that may arguably fall under the bailiwick of a dean of students, the comfort of a compassionate and familiar professor can be extremely meaningful. Given the reported rates of distress, the legal academy should marshal any available resources to humanize legal education and attend to student well-being.<sup>281</sup>

Law schools should also broaden the notion of career counseling as well to include more than advice about job acquisition, resume reviews, and practice interviews. Students would be better served by learning about the benefits and disadvantages of various practice areas, including non-legal career options, and be encouraged to reflect about their career goals, temperaments, and options. Introspection allows students to make deliberate and informed choices about what aspects of practice they will find challenging and fulfilling, what they cannot tolerate, and areas in which they can compromise. Faculty can supplement their career services offices by serving as ad hoc advisors who are willing to engage students in discussions calculated to dig below the surface of stated career goals and be available to discuss issues of values, professionalism, job satisfaction, and

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boundaries. However, schools could adopt formal advising programs that are designed and resourced to provide informal contact, such as brown bag lunches, to allow for free-flowing discourse. See, e.g., Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLINICAL L. REV. 413 (2005).

278. See William J. Rich, *Balance in Legal Education: Pervasive Principles*, 60 J. LEGAL EDUC. 122, 123 (2010) (“Engaged faculty also care about their students outside of the classroom, make themselves available for individual conferences, and respond to expressions of need or interest.”).

279. For example, after Hurricane Katrina, an outpouring of student interest coalesced into a large contingent dedicated to providing on the ground and immediate assistance, and the newly minted Student Hurricane Network planned and promptly executed service trips. After my school’s first trip to post-Katrina Mississippi, I accompanied students on the next two trips, first to New Orleans, and then to Texas to work with Texas RioGrande Legal Aid. Working, staying, and recreating with students provided ample opportunities to interact. The nature and intensity of trip served an equalizing function, fostered enduring social connections, and facilitated broad-ranging discussions about law, justice, and lawyering that are often lost under the structure and pressures of law school.

280. See Sturm & Guinier, *supra* note 40, at 535.

281. See *supra* Part II.A.



how to cultivate a balance between work and family. These conversations can be guided by the precepts of client-centered counseling, encouraging students to contemplate their goals expansively and consider all the ramifications of each choice based on their individual priorities, goals, and experiences. In the current economy, it is fair to question whether students have the luxury of thinking in those terms, and it is virtually impossible for career services offices, under enormous pressure to elevate employment statistics, to counsel desperate students to make carefully calculated choices. However, the temporary unattainability of some goals should not thwart efforts to foster reflection, even if students must temper their short-term expectations and behavior in light of the present economic circumstances.

Law schools can redouble their efforts to set up programming to facilitate interactions among faculty, practitioners, and students. The Inns of Court is an exemplary organization, providing both engaging programming and informal social interactions centered on themes related to lawyering and professionalism.<sup>282</sup> Collegiality can also be fostered with members of the local bar, who are often more than willing to mentor students. Less formal meetings would also be useful, such as brown bag lunches with no particular agenda, allowing issues to arise organically from unstructured conversations. With competing demands on faculty time, this intangible mandate is likely to fall by the wayside unless we explicitly value the ability to serve as an important force in the lives of students.

#### *H. Clinics/Externships/Experiential Education*

Law schools should strive to expand offerings that immerse students in real life lawyering. The multidimensional and potentially transformative value of clinics is undisputed. Clinical education serves multiple purposes by providing hands-on skills training, inculcating values, advancing justice, exposing students to problem solving, introducing ethics and professionalism as applied to real situations, and beginning the lengthy process of acculturation to legal practice.<sup>283</sup> With the luxury of smaller classes comes the opportunity to engage with students about critical issues that are merely abstract principles in the absence of authentic (rather than simulated) clients and the myriad pressures that accompany real

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282. *General Information*, AM. INNS OF COURT, <http://www.innsofcourt.org/Content/Default.aspx?Id=2> (last visited June 25, 2011). Local chapters of the Inns of Court set up engaging programs intended to provide connections between lawyers and the judiciary, with interactive programming to address emerging issues. *Id.*

283. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 58 (2009) (discussing RONIT DINOVITZER ET AL., NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 81 (2004) [hereinafter *After the JD*]). *After the JD* is a careful analysis of the impact of participating in clinics during law school. Recent law graduates consistently rated their clinic experience highly in terms of preparation of practice. *Id.* at 81 fig.11.1. To the surprise of many, participation in the clinic did not appear to inculcate an enduring commitment to public interest work, although the study did find that those predisposed to public interest work seemed to have had that inclination ossified by participation in a clinic.

practice. Clinical faculty strive to instill habits of self-reflection so that even after the experience, law students are motivated to remain vigilant and committed to ongoing professional growth. Clinical experiences are so instrumental in preparing students for the practice of law that some commentators argue persuasively that clinics should be universally required.<sup>284</sup>

Clinics offer experiences that cannot be manufactured in a classroom and can be profoundly meaningful for students. Clinics are uniquely positioned to facilitate “transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in the law.”<sup>285</sup> Exposure to real life situations and genuine clients also exposes students to the “disorienting moment”<sup>286</sup> that has been widely touted as integral to the development of sensitivity and an internal moral compass, as well as passion for the law and for justice.<sup>287</sup>

284. See Karen Tokarz et al., *Toward Universal Clinical Education: Why the Time Is Ripe for Requiring Clinical Courses for All Law Graduates 1* (unpublished manuscript), available at [http://www.nyls.edu/user\\_files/1/3/4/15/1009/Mandatory%20Clinical%20Legal%20Education%20draft%20Sept%2021%202010-1.pdf](http://www.nyls.edu/user_files/1/3/4/15/1009/Mandatory%20Clinical%20Legal%20Education%20draft%20Sept%2021%202010-1.pdf) (last visited June 10, 2011).

285. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1477 (1998) (internal citations omitted).

286. See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 38-39 (1995) (arguing that lessons of social justice are a necessary part of legal education generally, and clinical education in particular).

287. E.g., Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51 (2001); see generally ASS’N OF AM. LAW SCH., PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES 4 (2002), available at [http://www.aals.org/equaljustice/final\\_report.pdf](http://www.aals.org/equaljustice/final_report.pdf) [hereinafter EQUAL JUSTICE PROJECT]; David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285 (1992); Barry et al., *supra* note 7; John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167 (2004); Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23, 78 (2006); Dubin, *supra* note 285; Freamon, *supra* note 9, at 167; Hess, *supra* note 64, at 79 (lamenting the “psychological distress, dissatisfaction, and substance abuse” some attribute to the casebook method and opining that the impact of this teaching methodology could be ameliorated by experiences that confront students with issues of morality and social justice); Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443 (1992); Wizner, *supra* note 12; Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1011 (2004). Although a recent study found mixed results as to whether participation in clinics inspired students’ interest in social justice, it did conclude that participation in clinics likely nurtured and solidified those inclinations for students already predisposed to work in this area. See Sandefur & Selbin, *supra* note 283, at 99. There has been much hand-wringing about the erosion of public



Among the benefits offered clinics is instruction on professionalism<sup>288</sup> and exposure to moral issues, as “practice-oriented courses can provide important motivation for engaging with the moral dimensions of professional life—a motivation that is rarely accorded status or emphasis in the present curriculum.”<sup>289</sup> Clinical experiences further provide space for professors to inculcate values regarding the public service ethos of the profession.<sup>290</sup> Additional opportunities for experiential learning are available through externships<sup>291</sup> and other practice-oriented projects that can be integrated into the existing curriculum. In any of these opportunities, escaping the sterile classroom environment can be enormously gratifying, inspiring, and edifying.<sup>292</sup> Although these opportunities are resource-intensive to structure with appropriate pedagogical goals and oversight, there are creative ways to offer them. Unfortunately, even if the institutional resistance to a reoriented emphasis on skills training is surmounted, the ensuing discussion is often derailed by the perceived financial cost of low faculty-to-student ratios and labor intensive pedagogy, thrusting this debate squarely into the constant battle over the allocation of scarce resources. However, as David Chavkin demonstrates through his analysis of the relative costs of clinical training at his institution, some of this conventional wisdom may be illusory.<sup>293</sup>

Admittedly, advocates of expanded opportunities for experiential learning face a haunting conundrum. It is hard to reconcile demands for more labor-intensive, and therefore costly, experiential learning with a commitment to contain spiraling tuition costs. One solution discussed previously, the increased

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interest commitment among students as they progress through their legal education, so this finding should not be minimized. See Robert Granfield, *Institutionalizing Public Service in Law School: Results on the Impact of Mandatory Pro Bono Programs*, 54 BUFF. L. REV. 1355, 1412 (2007); Deborah L. Rhode, *Pro Bono in Principal [sic] and in Practice*, 26 HAMLINE J. PUB. L. & POL’Y 315, 320-23 (2005).

288. See Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 308-09 (2003) (“[C]linical legal education, with its convergence of theory and real-world practice, provides an ideal opportunity for teaching professionalism and ethics to students in meaningful ways.”).

289. CARNEGIE REPORT, *supra* note 2, at 88.

290. Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 293 (2003) (“[T]he issue is not whether law schools should seek to instill the legal profession’s public service norms, but rather, how this should best be done.”).

291. This Article does not wade into the debate as to whether clinics or externships are more valuable, but it is worth noting concern expressed by some that because externships are infinitely cheaper to run, educators must be wary of the risk that most experiential instruction will be outsourced as a cost-saving measure rather than a reasoned pedagogical decision.

292. This is not meant to suggest that the learning imparted in classrooms is without value, but simply that it cannot prepare students to practice alone without complementary training that situates students in the real world.

293. David F. Chavkin, *Experiential Learning: A Critical Element of Legal Education in China (and Elsewhere)*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 3, 13-14 (2009).

use of adjuncts, provides a partial response to the cost issue but implicates serious concerns related to the historically fraught status of clinical faculty. Shifting teaching to those with either a circumscribed or nonexistent role in faculty governance hearkens back to a time when clinical faculty were completely marginalized in the academy. Outsourcing supervision is risky and likely sacrifices some quality of interaction when an attorney is balancing supervision with the competing demands of his or her own practice. Moreover, those attorneys do not have the luxury of contemplating the nuances of pedagogy. Organized faculty mentoring is essential in any program that expands the use of adjuncts. On balance, the risks of the increased use of adjuncts to facilitate increased experiential learning opportunities must be carefully considered. This analysis should extend beyond the quality of the classroom experience to issues related to the structure of the academy.

### *I. Professionalism, Ethics, and Morals*

The Carnegie Report defines the third apprenticeship as one of “identity and purpose,”<sup>294</sup> an introduction to canons of ethical and social behavior through which students can begin to explore and develop their professional integrity, mission, and character.<sup>295</sup> This is partly achieved through explicit discussion, and partly through the “‘hidden’ curriculum,” which is comprised of the myriad subtle and unspoken ways that values are transmitted between and among faculty and students.<sup>296</sup> The ABA has recently exhorted lawyers to strive for higher ideals,<sup>297</sup> principles that should be unequivocally telegraphed to students during the first year.<sup>298</sup> In furtherance of these goals, the ABA is currently contemplating mandatory instruction in professionalism.<sup>299</sup> One commentator has suggested that if instruction and guidance about professionalism is incorporated into standards, there must be output measures to ensure that law schools take this relatively intangible commitment seriously.<sup>300</sup> To safeguard against a hollow and illusory

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294. CARNEGIE REPORT, *supra* note 2, at 28.

295. *Id.*

296. *Id.* at 29.

297. See AM. BAR ASS’N, “... IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 16-19 (1986) [hereinafter ABA BLUEPRINT], available at [http://www.abanet.org/cpr/professionalism/Stanley\\_Commission\\_Report.pdf](http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf); AM. BAR ASS’N, TEACHING AND LEARNING PROFESSIONALISM 13-25 (1996).

298. See generally Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659 (2009) (describing Mercer’s efforts to provide explicit instruction in professional ideals, starting with a credit-bearing class in the first year, and recognizing the importance of introducing these values at the outset of education).

299. Timmer & Berry, *supra* note 121, at 1 (noting that the American Bar Association’s Accreditation Standards Review Committee is considering inserting the word “ethical” into its description of participation in the legal profession).

300. See *id.* at 20 (“Because law schools have a significant opportunity for impacting the professional identity of lawyers, the schools must be accredited in a way that their commitment to professional identity development is encouraged, required, and measurable.”).



commitment to these ideals, schools need to develop thoughtful, integrated, and pervasive instructional plans. Mandatory instruction does not require schools to thrust values down the students' throats, but rather recognizes that institutional and personal reluctance to tread into areas characterized as values does a disservice to students and the profession.<sup>301</sup> The attitude that certain "soft" topics should be deliberately sidestepped has deep historical roots, as "Llewellyn and his followers so thoroughly purged most discussion of genuine ethics from the initial curriculum that law students and lawyers are now taught a process and not a purpose for the law."<sup>302</sup> However, leaving it to students to absorb professional ideals in a vacuum is fraught with peril. If schools fail to raise issues of the professional role, they run the risk that in the absence of guidance and modeling, some students will consciously or unconsciously imprint on the first lawyers with whom they interact and assume that such conduct represents acceptable professional behavior. These issues are too important to leave to chance. A much better practice is to raise issues of professional identity proactively so that within the expansive range of behavior that is not explicitly proscribed,<sup>303</sup> students can think through their own values and priorities and develop a philosophy of lawyering that is consistent with those ideals.<sup>304</sup> Even if they parse cases and statutes based on neutral principles of legal analysis, "[l]aw professors cannot be value-neutral on matters of value."<sup>305</sup> As members of a self-regulating profession that is central to reinforcing our nation's democratic ideals, law professors have an obligation to inculcate some universal minimum standards, the absence of which can impede both procedural and substantive justice.

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301. The supposition that we can be completely neutral with respect to values is faulty. It is better to acknowledge our assumptions and perspectives and point out various alternatives to our views than to falsely suggest that one can be truly be a blank slate, disassociated from all the aspects of one's identity, ideals, and lifetime of experiences.

302. Steve Sheppard, *Teach Justice*, 43 HARV. C.R.-C.L. L. REV. 599, 599-600 (2008).

303. See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 75 (2000) ("Almost all significant ethical decisions that lawyers face in the practice of law involve discretion. For some of these decisions, no rules or standards guide lawyers.").

304. Timmer & Berry, *supra* note 121, at 15 ("[T]hen there are the rest—the future lawyers wandering through law school becoming soulless automatons as they master the case method and learn to be passionate about the perspective of the party who hired them, losing themselves in the process. These are the students whose souls might be released and liberated to carry their values along with them into practice. Rather than leave their souls behind, they can learn when, where, and how to incorporate their personal beliefs, morals, and ethics into the practice of law, thereby ensuring a career that they can live with and be proud of.").

305. RHODE, *supra* note 180, at 203; see also Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583, 583, 591 (1998) (suggesting that "law schools [are] educating students for technical proficiency, but failing to inculcate in them a proper sense of their social and public responsibilities as members of the legal profession" and contending that "[l]aw schools, and particularly law teachers, have a 'moral responsibility' to democratize our legal culture.").

Law schools typically do not address the ethical, moral, and professional choices students will necessarily face. To inoculate students against the surprise and confusion when these issues arise, and to enhance the process of thoughtful and principled resolution of these issues, students should be introduced to the vexing ethical and moral questions they will confront in practice early and often, throughout the curriculum. Frequent exposure to these formative issues will sensitize students and help prepare them in advance of encountering these scenarios in practice, when they are presumably under more pressure and potentially more myopic as a result.<sup>306</sup> Reflection will not necessarily minimize or eliminate exposure to difficult issues, but students will be better prepared to formulate a system for resolving them, or they will select an area or type of practice where they can exercise some greater control about the issues that are likely to arise.<sup>307</sup> Because morality is deemed personal, discussion of morality is typically relegated to the periphery of education, if it happens at all. This is a mistake, as “[i]t is incumbent on the national law school faculty to give law students tools to argue about moral duty, to recognize a compelling moral argument, and to prepare students to engage in the moral practice of law.”<sup>308</sup> Avoiding these topics sends a tacit and undesirable message: “[w]hen faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice.”<sup>309</sup> Some articles that deconstruct the elusive concept of professionalism exalt lawyering as a learned profession and note that all but the most sophisticated clients cannot truly assess the services they retain. The nature of our self-regulating profession and our monopoly of legal representation elevates the collective obligation to seek and advance justice.

As part of the critique of law, legal institutions, and lawyering that comprise a well-rounded legal education, students should be exposed to the underlying philosophy of our system. This understanding should extend beyond an ability to parrot back the nature of our esteemed adversarial system and its obligation to adhere to the tenets of zealous representation for individual clients.<sup>310</sup> Students

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306. See Beth D. Cohen, *Helping Students Develop a More Humanistic Philosophy of Lawyering*, 12 J. LEGAL WRITING INST. 141, 152-58 (2006).

307. Even if lawyers expect to assume heroic postures in all cases and for all clients, they will invariably be confronted with difficult clients and ethical conundrums, and they will at some point inevitably and unavoidably grapple with issues of paternalism and other dilemmas.

308. Sheppard, *supra* note 302, at 601.

309. CARNEGIE REPORT, *supra* note 2, at 140.

310. For some students, the process of disengaging their moral compass and following the dictates of client prerogative can be deeply disconcerting. Much has been written of the personal cost of the “hired gun” approach, in which the lawyer is merely executing a function in an adversarial system, irrespective of her moral reaction to the objectives of representation in a particular case. See, e.g., Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 13 (1995) (explaining moral activism, which “in its broadest sense demands accountability from lawyers for their actions, and tends not to permit the mere fact of occupational role expectations



should be encouraged to explore the obvious and hidden costs and benefits of this system that requires subversion of the greater good to the interests of individual clients, both for those who interact with our legal institutions and for lawyers individually, who will invariably be forced to advocate for positions they would not personally choose. Exposing students to the spectrum of alternative constructs that exist in other legal systems empowers them to engage in a comparative critique of the axioms upon which each system is based and to understand the implicit values and tradeoffs. Being prepared for these contingencies, acknowledging the potential toll our system exacts, and understanding why these compromises are foundational in our system may minimize the impact for those who don the mantle of zealous advocacy with some ambivalence.

Professors can insert opportunities to discuss ethics, morals, and professional ideals by making an effort to recontextualize the cases under discussion, indentifying personal and humanizing details about the clients, and examining the broader social, political, historical, and economic context that the conflict inhabits.<sup>311</sup> Attention to the issues deemed essential to the formation of a responsible, integrated, and professional identity cannot wait until the second or third year of study, when students may have effectively, but not necessarily auspiciously, internalized the disconnection between their morals and their mastery of dispassionate and analytical reasoning.<sup>312</sup> Additionally, these issues should be taught pervasively, not just in a course focused on ethics that is relegated to the margins of the curriculum. The tacit message is that the mastery of technical ethical guidelines is sufficient instruction. An effort to integrate these topics into other courses would situate them within the overarching framework that requires some lawyers to subvert their personal morality to their lawyering persona, sometimes at considerable cost to their sense of integrity and well-being. Providing pervasive instruction permits an exploration beyond our rule-bound, proscriptive approach to ethics as a rich opportunity to nurture their sense of personal ethics and morality. Expansive discussions can be supplemented by concrete teaching tools, such as movie clips, role plays, small group discussions, reflective essays, guest speakers, and other exercises designed

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to justify lawyer conduct"). Some ethicists suggest that we adopt a more flexible model in which lawyers are permitted, but not required, to include political considerations of the choices faced in the process of representing clients. *See generally* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); Beverly Balos, *The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves*, 4 *CLINICAL L. REV.* 129 (1997). This permits the lawyer some flexibility to allow her personal moral and professional spheres to coexist. Encouraging students to explore various reactions to the role they will play in our adversarial model should be done frequently.

311. In the first year, "students are told repeatedly to focus on the procedural and formal aspects of legal reasoning, its 'hard' edge, with the 'soft' sides of law, especially moral concerns or compassion for clients and concerns for substantive justice either tacitly or explicitly pushed to sidelines." *CARNEGIE REPORT*, *supra* note 2, at 141.

312. *See id.* at 142.

to engender real dialogue. An approach that carefully circumvents or studiously ignores discussion of the intersection of ethics, morals, and professionalism does nothing to inculcate a heightened sense of responsibility in all areas.<sup>313</sup> Ethics and professionalism should be considered a broad, idealistic, and aspirational construct that extends beyond regulatory dictates.<sup>314</sup>

*J. Public Interest Work*<sup>315</sup>/*Access to Justice*<sup>316</sup>/*Pro Bono*<sup>317</sup>

Our vaunted democratic ideals are premised on the notion of equal access to justice. The concept of “equality before the law is at the core of the social contract just as peacefully resolving disputes between citizens, including between citizens of different economic and social classes is . . . the ‘chief reason,’ but

313. *Id.* at 149; see also Jeremy Cooper & Louise G. Trubek, *Social Values from Law School to Practice: An Introductory Essay*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 9, at 1, 14 (“A law school . . . can too easily destroy the potential desire of law students to commit themselves passionately and wholeheartedly to social justice, by its obsession with the acontextual, the dispassionate, and the analytical.”).

314. It is critical to emphasize professionalism and ethics beyond examination of the rules, as they are largely proscriptive and fail to articulate lofty standards. See Daniel S. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don’t Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 370 (1989) (“[T]he rules are seen primarily as a set of *malum prohibitum* commands to be parsed, analyzed, interpreted, and distinguished—just like any set of regulations applicable to any other trade or business.”).

315. See Russell Engler, *From the Margins to the Core: Integrating Public Service Legal Work into the Mainstream of Legal Education*, 40 NEW ENG. L. REV. 479, 485 (2006) (“Numerous studies reveal the extent to which the values of law students are shaped by their law school experiences and those experiences typically push students away from, rather than toward, public interest work.”); see also Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 288 (2001) (“A provocateur for justice actively imbues . . . students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice.”).

316. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1, 28 (2009), [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [hereinafter DOCUMENTING THE JUSTICE GAP] (noting that under 20% of low-income persons get the legal assistance they need and that “to fund these needs, the federal share must grow to be five times greater than it is now, or \$1.6 billion”); Engler, *supra* note 315, at 484 (“Legal needs studies have consistently shown that anywhere from seventy to ninety percent of legal needs of the poor go unaddressed in America.”); Robert Robinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 104 (2005) (“Everyone—lawyers, judges, academics, the public—knows that the ‘rich’ get more justice than everyone else.”).

317. Comment 1 to Rule 6.1 of the American Bar Association Model Rules of Professional Conduct states that “[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.” MODEL R. PROF’L CONDUCT 6.1 cmt. 1 (2004).



obviously not the only purpose, for government itself.”<sup>318</sup> Despite its foundational underpinnings, “[i]t is astonishing that the principle of equal justice—a principle enshrined in virtually every articulation and embodiment of civic virtue and pride in our democracy, from courthouse facades, to the Pledge of Allegiance, to the iconography of ‘blind justice’—remains so obviously and utterly hollow and illusory.”<sup>319</sup> A panoply of fundamental rights are rendered inconsequential if people lack the resources and access to vindicate them. Yet in a system that lauds its adherence to the rule of law, the inattention to equal access to justice is shameful. The statistics are undeniably stark—for every 6415 people who are eligible for free legal services, there is one attorney, while the corresponding ratio for attorneys providing private legal services is 429 to one.<sup>320</sup> The federal funding of legal services through the Legal Services Corporation, which originated in 1981, has been appreciably diminished in real dollars.<sup>321</sup> Securing increased funding for the poor is a tough sell when economic suffering is omnipresent, but woefully unequal access to the justice system predated our current economic crisis and will endure long past its recovery. Even in better times, the United States has still lagged far beyond other developed and democratic societies. Studies demonstrate a lamentable comparison between expenditures for access to justice in the United States and other countries, pointing out that one would expect that in a purely adversarial system, financial investment would be proportionally higher than in systems that are premised on an inquisitorial style, where judges are active participants in the fact-finding mission.<sup>322</sup> The two largest sources of funding for legal services providers are the Legal Services Corporation<sup>323</sup> and money generated through the Interest on Lawyers Trust Accounts program (IOLTA).<sup>324</sup> Decreases in IOLTA coffers, due in part to a lack of the economic activity that generates the funds<sup>325</sup> and

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318. Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 FORDHAM URB. L.J. 157, 215 (2010) (citation omitted); see also Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 691 (2006) (“A society based on the rule of law fails in one of its central premises if substantial parts of the population lack access to law enforcement institutions.”).

319. Rubinson, *supra* note 316, at 156.

320. DOCUMENTING THE JUSTICE GAP, *supra* note 316, at 19.

321. Johnson, *supra* note 318, at 210-11.

322. See *id.* at 200; see also Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 979 (2009) (suggesting that certain aspects of civil law systems, in which judges play an inquisitorial role, may be suitably adopted by our system to advance access to justice).

323. Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 409-10 (2005).

324. *What Is IOLTA?*, IOLTA.ORG, <http://www.iolta.org/grants/> (last visited June 11, 2011).

325. See Luz E. Herrera, *Rethinking Private Attorney Involvement Through a “Low Bono” Lens*, 43 LOY. L.A. L. REV. 1, 29 (2009) (“Moreover, funds earned through the Interest on Lawyers Trust Accounts (IOLTA) program have reached dismal lows with the lowering of interest rates.”);

compounded by dramatic state budget cuts, have further eroded the ability of legal services offices to provide representation to those in need.<sup>326</sup>

The current statistics evince an unprecedented crisis, and law schools, as the point of entry into the legal profession, have an obligation to inculcate in students a sense of responsibility to respond.<sup>327</sup> This commitment must be more than just hollow admonitions or aspirational exhortations to undertake this work as a worthy charity; it must be a fundamental component of their professional identity. By raising the importance of these ideals to the very foundation of our system, professors can work to dislodge complacency. Justice for all should not be a contested, controversial, or illusory concept.<sup>328</sup> Since lawyers have constructed a state-sanctioned system that confers a complete monopoly in the provision of legal services, law schools must instill the ethos that this privilege is accompanied by the solemn obligation to ensure that equal justice is a reality. This extends beyond mere access to the courtroom door to the obligation to work toward eliminating the barriers to structural equality.<sup>329</sup> Raising these issues in class

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Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid*, N.Y. TIMES, Jan. 19, 2009, at A12 (“[A]s the federal funds rate declined along with the number of real estate transactions, the payout has fallen precipitously.”).

326. Kathleen A. McKee, *The Impact of the Current Economy on Access to Justice*, 62 ME. L. REV. 613, 627 (2010) (“In light of the reduction in IOLTA funding, some legal aid programs face program budget cuts of up to 50 percent. Projected shortfalls in 2008 IOLTA revenue ranged from a low of \$2.3 million in Illinois to a high of \$15 million in New Jersey and Massachusetts. In practical terms, the president of Legal Services of New Jersey estimated that ‘for every million dollars New Jersey loses in money for legal services, it must lay off 20 staffers and serve 900 fewer clients.’” (internal citations omitted)); Neeta Pal, *The Economy and Civil Legal Services*, BRENNAN CTR. FOR JUSTICE, Apr. 22, 2011, [http://www.brennancenter.org/content/resource/the\\_economy\\_and\\_civil\\_legal\\_services1/](http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services1/) (“IOLTA revenue has plummeted due to declining interest rates.”).

327. The current state of affairs surfaces discussions about whether pro bono work should be mandatory for lawyers, who enjoy an absolute, state-sanctioned monopoly on the provision of legal services and arguably should be subjected to a heightened duty to advance access to justice. While relevant and important, that debate is beyond the scope of this Article.

328. Rhode, *supra* note 55, at 1021 (“[M]ost legal academics have done little to educate themselves, the profession, or the public about access to justice and the strategies necessary to increase it. . . . [W]e are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews.”). See DEBORAH L. RHODE, ACCESS TO JUSTICE 191-93 (2004), for a discussion about the responsibility of legal educators to instill professional values. “Legal education plays an important role in socializing the next generation of lawyers, judges, and public policymakers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority.” *Id.* at 193; see also Barnhizer, *supra* note 287, at 337; Calmore, *supra* note 287, at 1169.

329. See EQUAL JUSTICE PROJECT, *supra* note 287, at 3 (“The Project eschewed the term ‘access to justice’ in its planning literature in the belief that access to the legal system, though critical to many when meaningful, did not capture the full range of legal inequality that affects people and communities . . .”).



should augment student awareness,<sup>330</sup> and it may serve to sustain a passion for justice that initially draws some idealistic students to the practice of law but becomes attenuated under the pressure and rigors of school and legal practice.<sup>331</sup>

Schools can inculcate a commitment to equal access to justice and professional obligation by nurturing these ideals in law school.<sup>332</sup> One way to do so is by investing in a vibrant pro bono culture within the school<sup>333</sup> under the guiding principle that “free legal work for clients who cannot afford legal services is a vivid enactment of the law’s professional identity.”<sup>334</sup> Law schools should demonstrate a tangible commitment to pro bono work not merely by empty encouragement, but by providing opportunities, an institutional framework, and administrative attention that communicates implicit values.<sup>335</sup> A powerful message from law schools and concrete actions that support those ideals can create a culture of service and pro bono work that endures after graduation.<sup>336</sup>

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330. Dwight Aarons, *A Nuts and Bolts Approach to Teaching for Social Change: A Blueprint and a Plan of Action*, 76 TENN. L. REV. 405, 407 (2009) (“Raising social justice issues in the law school classroom should raise the social consciousness of all students.”).

331. *Id.* (noting that justice-related themes “may encourage students who came to law school intent on serving the public interest not only to retain their idealism and values, but to consider how they might put that idealism and those values into action”).

332. See Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 400 (1994) (asserting that “‘law schools . . . constitute the greatest opportunity’ to instill an ethic of public service in young lawyers” (citation omitted)); Kuehn, *supra* note 290, at 293 (“[T]he issue is not whether law schools should seek to instill the legal profession’s public service norms, but rather, how this should best be done.”); EQUAL JUSTICE PROJECT, *supra* note 287, at 3 (“[L]aw schools have a vital role to play in explicating the nature of the problems and generating approaches for their resolution.”).

333. E.g., Leslie Boyle, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 415-16 (2007); Steven B. Scudder, *Justice Will Prevail (with a Little Help from Her Friends): Pro Bono in Utah*, 2006 UTAH L. REV. 1081, 1082 (analyzing the pro bono culture in Utah, “explor[ing] strategies for changing the culture of pro bono nationally,” and asserting that America’s law schools can play a vital role in establishing and expanding pro bono services).

334. CARNEGIE REPORT, *supra* note 2, at 138.

335. See Engler, *supra* note 315, at 493 (addressing the importance of instilling a commitment to provide legal services to the poor and advocating for more coherence in law school programs aimed at equal justice).

336. E.g., DEBORAH L. RHODE, *PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS* (2005); see also Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2431 (1999) (suggesting that thoughtful strategies employed by law schools to involve law students in pro bono projects while in the developmental stage of their professional identity can significantly affect their commitment to pro bono activities); Larry R. Spain, *The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students*, 72 UMKC L. REV. 477, 492 (2003) (asserting that “[a]ccess to justice and a commitment to pro bono service should become an institutional priority at every law school,” and to that end, every law school should develop an

One study demonstrated that a school's success in inculcating an ethos of pro bono work depends in large part on "how supportive the school's overall culture is of such experience and how well integrated it is into the students' developing understanding of what it is to be a lawyer."<sup>337</sup> Admittedly, resistance to these ideals may emanate from those who see a license to practice law as a ticket to wealth and status. Other options include collaborative partnerships between law schools, private firms, and non-profit organizations<sup>338</sup> and other alliances that serve the dual goals of conveying an institutional commitment to pro bono work and providing much-needed services to the community.<sup>339</sup> These initiatives can also enhance opportunities for mentoring, networking, and practical lawyering.

Pro bono efforts and experiential learning opportunities can be supplemented by incorporating justice work into existing courses. For example, in a class that includes a research and writing component, professors can encourage students to select topics that serve the dual goals of inspiring and engaging them individually while providing much needed labor for under-resourced agencies, instead of having students focus on topics that represent purely academic inquiries.<sup>340</sup> Structures already exist for non-profits to identify areas of research that would be useful to them. Students could also be assigned other projects with practical utility.<sup>341</sup> Debates as to whether participation in pro bono efforts should be mandatory in law school are beyond the scope of this Article, but it is worth heeding the caution that obligatory programs may ultimately emphasize the acquisition of skills over justice-related goals.<sup>342</sup>

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agenda for the provision of pro bono services).

337. CARNEGIE REPORT, *supra* note 2, at 139.

338. See generally Laurie Barron et al., *Don't Do It Alone: A Community-Based, Collaborative Approach to Pro Bono*, 23 GEO. J. LEGAL ETHICS 323 (2010) (affirming the need for pro bono services and suggesting a tripartite model—involving faculty and students, law firms, and community organizations—that responds to the need for legal services for low income clients and communities).

339. E.g., Dale Margolin et al., *Empowerment, Innovation, and Service: Law School Programs Provide Access to Justice and Instill a Commitment to Serve*, 48 FAM. CT. REV. 672, 672 (2010) (describing five pro bono programs "where law students, under the supervision of [faculty] . . . or community professionals, provide assistance or legal representation to underserved . . . populations").

340. For example, the American Constitution Society compiles a list of public interest research topics. *About ResearchLink*, AM. CONST. SOC'Y L. & POL'Y, <http://researchlink.acslaw.org/> (last visited June 11, 2011) ("ACS ResearchLink collects legal research topics submitted by practitioners for law students to explore in faculty-supervised writing projects for academic credit."). Additional outreach could generate an expanded list of topics.

341. For example, at Western New England College, Judge Dina Fein teaches a course entitled "Access to Justice." Students in that course select projects intended to assist local organizations and can include developing pro se training manuals, websites, policy suggestions, and other work with practical applications.

342. But see Granfield, *supra* note 287, at 1404-05 ("[I]n mandatory [pro bono] programs, the emphasis on skills training may usurp the question of professional commitment to serving



The legitimacy of the entire system is undermined when so few of the nation's poor and middle class cannot proceed past the courthouse steps,<sup>343</sup> a reality that communicates an intolerable indifference to those at the bottom of the socioeconomic ladder.<sup>344</sup> The harsh economic realities of practice can throw cold water on idealism and a commitment to advance access to justice, and the economic downturn makes advocacy for increased funding for legal services a seemingly futile goal. To raise awareness of this reality, lawyers and law professors must disabuse the public of the notion that our system, as currently structured, comes even remotely close to satisfying our venerated ideal of equal access to the law, to justice, and to lawyers.

### *K. Challenge the Primacy of U.S. News*<sup>345</sup>

The *U.S. News and World Report* ranking system exerts a hegemonic and ultimately destructive influence in law school culture, indirectly dictating institutional responses at every level of administration, from admission to bar

underrepresented populations. . . . One potential drawback of mandatory pro bono programs and their tendency to focus on skill-based benefits might be that they unintentionally dilute the meaning and purpose of pro bono.”).

343. A push for a “Civil Gideon” has been recently reinvigorated. See, e.g., Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999) (advocating pro se court reform); Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 697 (2006) (advocating for a Civil Gideon). Even if such a system were implemented, we still must safeguard against failures within the system—ineffective assistance of counsel, an unlevel playing field, overworked attorneys, bias, and other impediments to equal access to justice.

344. But see Rhode, *supra* note 55, at 1016 (noting that many people labor under a misperception about the availability to legal counsel to the poor: “Four-fifths of Americans believe, incorrectly, that the poor are entitled to counsel in civil cases; only a third think that low-income individuals would have difficulty finding legal assistance, a perception wildly out of touch with reality.”).

345. See Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003-2007*, 78 U. COLO. L. REV. 35, 37 (2007) (“There is increasing evidence that law schools have bent their practices of admission, expenditures, hiring, and even their modes of reporting to the ABA in response to the *U.S. News* rankings.”); Francine Cullari, *Law School Rankings Fail to Account for All Factors*, 81 MICH. B.J. 52, 52 (2002) (pointing out that “applicants, administration, trustees to a certain extent, faculty, and employers pay attention to the [*U.S. News*] rankings.”); MICHAEL SAUDER & WENDY ESPELAND, LAW SCH. ADMISSION COUNCIL, FEAR OF FALLING: THE EFFECTS OF *U.S. NEWS & WORLD REPORT* RANKINGS ON U.S. LAW SCHOOLS 1 (2007), available at <http://www.lsac.org/LSACResources/Research/GR/GR-07-02.asp> (“One general effect of the . . . [*U.S. News*] rankings on law schools is that it has created pressure on law school administrators to redistribute resources in ways that maximize their scores on the criteria used by . . . [*U.S. News*] to create the rankings, even if they are skeptical that this is a productive use of these resources.”).

passage to employment statistics.<sup>346</sup> The literature analyzing the impact of *U.S. News* is predominantly negative. Scathing criticism for the damage caused by the *U.S. News* ranking system is multifaceted. Commentators argue, among other things, that the system decreases incentives for innovation,<sup>347</sup> measures the wrong things,<sup>348</sup> has a deleterious impact on admissions decisions<sup>349</sup> and diversity,<sup>350</sup> is unreliable,<sup>351</sup> contributes to the escalation of law school costs,<sup>352</sup> is unrelated to

346. See Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1 (“Students entering law school have little way of knowing how tight a job market they might face. The only employment data that many prospective students see comes from school-promoted surveys that provide a far-from-complete portrait of graduate experiences.”). Reporting is not always constructive. See Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 211 (2006) (“Pressure to boost placement statistics has encouraged schools to broaden their definition of employment to include non-legal jobs and to invest heavily in tracking students who do not respond to their employment surveys.”); see also Kyle P. McEntee & Patrick J. Lynch, *A Way Forward: Improving Transparency in Employment Reporting at American Law Schools* (Apr. 8, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1528862> (describing efforts to launch a website aimed at providing unvarnished employment statistics about law school graduates).

347. See Rachel F. Moran, *Of Rankings and Regulation: Are the U.S. News & World Report Rankings Really a Subversive Force in Legal Education?*, 81 IND. L.J. 383, 383 (2006) (noting that “norms of uniformity and standardization have dominated the world of legal education, substantially limiting law schools’ ability to compete against one another” and that accordingly, law schools are reluctant to innovate lest they risk their accreditation, reputation, and future).

348. See, e.g., Brian Leiter, *How to Rank Law Schools*, 81 IND. L.J. 47, 52 (2006) (“We should produce more rankings that unleash academic talent and ambition, not rankings that reward decanal connivance at manipulating ranking schemes cooked up by journalists.”).

349. See Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admission Process of Law Schools*, 40 LAW & SOC’Y REV. 105, 105 (2006) (finding that the *U.S. News & World Report* rankings “have significant [negative] effects on both the decisions of prospective students and the decisions schools make in the admissions process”).

350. Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CAL. REV. L. & SOC. JUST. 587, 589 (2009) (highlighting “concerns about the impact of rankings on diversity, and rais[ing] questions about how to think about professional diversity”); Laura Rothstein, *The LSAT, U.S. News & World Report, and Minority Admissions: Special Challenges and Special Opportunities for Law School Deans*, 80 ST. JOHN’S L. REV. 257, 258 (2006) (arguing that the *U.S. News* “purported measure of quality” ignores the importance of diversity).

351. See generally Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493 (2007) (demonstrating the unreliability of *U.S. News* rankings of law schools through a comprehensive analysis).

352. Emily A. Spieler, *Making Legal Education More Practical*, NAT’L L.J., Feb. 22, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443868634&slreturn=1&hbxlogin=1> (“A recent U.S. Government Accountability Office report indicates that rising tuition levels are, at least in part, a reflection of law schools’ response to the ‘rankings game.’”) (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED



the quality of education provided by the institution,<sup>353</sup> and is not individualized for the needs of each student and offerings of a particular school.<sup>354</sup> Perhaps most damning, the dominance of the ranking system creates immense pressure, and “schools frequently manipulate the rankings by reporting false data.”<sup>355</sup>

The ABA’s Section of Legal Education and Admissions to the Bar’s report on the *U.S. News and World Report* rankings examined the impact of the ranking system and outlined three primary concerns.<sup>356</sup> Citing a U.S. Government Accountability Office report, the ABA’s report concluded that because the ranking system considers per pupil expenditure, schools that endeavored to keep costs down would face the perverse result of faring worse in the ranking than those who made no effort to contain costs.<sup>357</sup> As a result, the ranking system

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TO LAW SCHOOL COST AND ACCESS (2009)).

353. See M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn from Those Professors Who Teach Legal Writing*, 61 MERCER L. REV. 899, 903 (2010) (“The *U.S. News & World Report* rankings are the tail that wags the dog. The rankings are based on statistical measures that have little to do with the quality of the education, yet they are widely used by prospective students and faculty, as well as prospective and existing donors and employers, for that very purpose”).

354. See Joanna Grossman, *U.S. News & World Report’s 2005 Law School Rankings: Why They May Not Be Trustworthy, and How the Alternative Ranking Systems Compare*, FINDLAW (Apr. 6, 2004), <http://writ.news.findlaw.com/grossman/20040406.html> (asserting that legal education has fallen hostage to the *U.S. News* rankings and students would be better served by “more subjective assessment of the fit between a student’s needs and a school’s offerings”).

355. Thies, *supra* note 51, at 617. Instead of obfuscating the real figures, schools should provide useful and transparent information on short-term and long-term job prospects. Thies recommends that the ABA “require law schools to provide more information to prospective students about the career prospects of their graduates.” *Id.* at 599. Also, there should be methods to safeguard against suspicious statistics or at least illuminate the methodology. For example, schools have been using post-graduate programs to elevate employment statistics. In response, schools argue that if everyone else is employing sketchy reporting methodologies, they will be disadvantaged by more candid reporting. This phenomenon reinforces the need for more transparency in the process. Students would also benefit from some sort of pre-counseling to see if law school is the right fit for them. Some students may end up at law school by default, because they were not interested in business or medicine, and they may not feel a genuine calling to the profession. Giving students full information would help them make informed decisions. Also, a recent study concluded that grades, rather than the elite status of the school, are a better predictor of salary. See Ashby Jones, *New Study: Forget the Rankings, Just Bring Home Straight A’s*, WALL ST. J. L. BLOG (July 30, 2010, 2:24 PM EST), <http://blogs.wsj.com/law/2010/07/30/new-study-forget-the-rankings-just-bring-home-straight-as/>.

356. MARTHA DAUGHTREY ET AL., AM. BAR ASS’N, REPORT OF THE SPECIAL COMMITTEE ON THE *U.S. NEWS AND WORLD REPORT* RANKINGS 3-4 (2010) [hereinafter ABA REPORT], available at <http://amlawdaily.typepad.com/files/f.usnewsfinal-report.pdf>.

357. *Id.* at 3 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 352). On an anecdotal note, one school worried that if it charged less in tuition than its competitors, students would perceive that the school offered a less valuable commodity, putting it at a competitive disadvantage.

encourages tuition increases.<sup>358</sup> Second, the report concluded that the rankings system incentivizes admissions offices to gear financial aid toward students with high LSATs and GPAs rather than students with greater financial need, requiring the neediest students to borrow more money.<sup>359</sup> Finally, the report concluded that the *U.S. News* rankings have an adverse impact on the goal of increasing diversity in law school, as “the overriding importance of the *U.S. News* metric has tended to drive other measures of quality and mission to be down-played, and that racial diversity has been one of the casualties.”<sup>360</sup> The report discussed various efforts to minimize the deleterious effect of the ranking system—including attempts to convince *U.S. News* to modify its system, proposals to educate the public about the system’s shortcomings and thereby decrease its power, and initiatives to coalesce resistance from law schools in cooperating with *U.S. News*.<sup>361</sup> With little results accruing from these efforts, the report concluded that the system is unlikely to undergo significant transformation, yet it did not want to discourage a continued campaign advocating for a system designed to honor the differences in law school missions and discourage the disincentives to innovation or resistance to the hegemony of considered factors.<sup>362</sup>

Not everyone is critical of the rankings system. Some analysts, while conceding the system’s shortcomings, argue that the tool has some utility for students<sup>363</sup> and that the rankings match students with employers.<sup>364</sup> Further, there may be some benefits, such as requiring schools to report pro bono efforts. Various proposals suggest alternatives designed to redress the pitfalls of the *U.S. News* methodology,<sup>365</sup> such as a proposal for a two-tiered ranking system<sup>366</sup> and

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358. “[T]he move to a more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings appear to be the main factors driving the cost of law school.” U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 352, at 2.

359. As Paula Lustbader points out, reliance on the LSAT perpetuates distributive injustice, since students with fewer economic resources are less likely to take a LSAT preparation course, with a corresponding decrease in chances for admission and merit based financial aid. Lustbader, *supra* note 269, at 617.

360. ABA REPORT, *supra* note 335, at 3-4.

361. *Id.* at 4.

362. *Id.*

363. See, e.g., Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 407-08 (1998). Professor Korobkin notes that students read and value rankings because they know that attending a highly-ranked school signals their quality to desirable employers, who also study the rankings in order to interpret these indicators. *Id.* at 407-09. This coordination function is served whether or not the rankings accurately measure the quality of law schools, however defined. *Id.* at 410.

364. *Id.* at 409-10.

365. See, e.g., Jon M. Garon, *Take Back the Night: Why an Association of Regional Law Schools Will Return Core Values to Legal Education and Provide an Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517 (2007) (suggesting regional alliances aimed at combating the dominance of *U.S. News*); Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83



the use of SSRN as a more accurate indicator of scholarly impact, but none are likely to pose any real challenge to its dominance any time soon.<sup>367</sup>

To limit the primacy of and damage inflicted by the ranking system, some commentators have exhorted law schools to engage in collective and concerted action to refuse to participate, recourse that does not seem to have gained much traction. Other options include the development of an alternative ranking mechanism that gives students transparent and useful information about law schools that is relevant to their professional goals, at least as much as they are able to identify before they start school.<sup>368</sup> Such a system might actually promote innovation and differentiation among law schools that currently believe they have no choice but to strive to emulate the model of the elite law schools against which they will be measured.<sup>369</sup> Alternatively, survey instruments need to be modified, perhaps through independent verification, to prevent schools from manipulating data.<sup>370</sup> In addition to the foregoing advantages of systemic reform, the rejection

IND. L.J. 791 (2008) (arguing that law schools or governing organizations should compile meaningful information for prospective students); Patrick T. O'Day & George D. Kuh, *Assessing What Matters in Law School: The Law School Survey of Student Engagement*, 81 IND. L.J. 401 (2006) (arguing that indicia of student engagement are a better measure of the value of a law school program than *U.S. News*); Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006) (comparing *U.S. News* ranking with alternative methodologies); Cass R. Sunstein, *Ranking Law Schools: A Market Test?*, 81 IND. L.J. 25 (2006) (arguing for a market test relying on students' choices); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the Rankings and Suggestions for a Better Approach to Evaluating Law Schools*, 40 HOUS. L. REV. 419 (2003) (examining the flaws of the ranking systems).

366. See generally Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83, 95 (2006) (identifying the disadvantages of *U.S. News* and exploring advantages and disadvantages of the Social Science Research Network (SSRN) measures and proposing using them to supplement existing measures of law schools' performance); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools,"* 100 DICK. L. REV. 647, 667-75 (1996) (arguing that legal institutions should be ranked on two different models—research institutions and teaching institutions).

367. But see Sam Kamin, *How the Blogs Saved Law School: Why a Diversity of Voices Will Undermine the U.S. News & World Report Rankings*, 81 IND. L.J. 375, 381 (2006) (noting that information is increasingly available to prospective students through the Internet).

368. This will presumably be a fluid dynamic once they are immersed in school.

369. However, the elite law schools can sometimes take risks that the lower schools cannot—for example, not providing class rank, with little risk that employers will decline to interview students who have not been pre-sorted by grades (although there are still ways to distinguish oneself with the standard indicators of law school achievement, such as participation in law reviews and stellar faculty recommendations).

370. Andrew Morriss and William Henderson propose the following:

Law schools, acting through their accrediting agency, the ABA, could authorize NALP to compile and publish school-level salary and employment information. Providing information on the distribution of salaries of recent graduates would, for example, allow students a realistic method of comparing their expected debt levels to their ability to pay

of *U.S. News* as a driving force likely would have a positive impact on diversity in law schools.<sup>371</sup>

*L. Revisit the Elevation of Scholarship and Broaden Its Focus/Reward*<sup>372</sup>

Theoretically, law school academics are expected to excel in three areas—teaching, scholarship, and service. In reality, scholarly productivity is the coin of the realm, and within the “publish or perish culture,” at least until tenure, teaching is a distant second at many institutions.<sup>373</sup> “[M]any American law schools continue to privilege theory over practice in teaching, scholarship, and institutional mission.”<sup>374</sup> While many scholars aver that engaging in scholarly inquiry and writing inures to the benefit of students, studies are more equivocal about a clear and demonstrable link between scholarship and the quality of teaching.<sup>375</sup> Legal scholars relish the time to contemplate legal issues and argue

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off student loans after graduation. Salaries have the potential to exert a large anchoring effect on law student expectations; furthermore, average salaries can be substantially affected by a small fraction of students obtaining lucrative large firm employment. Therefore, a more useful and accurate summary of information would provide a detailed breakdown of employment type by law schools.

Morriss & Henderson, *supra* note 365, at 831 (internal citations omitted).

371. See Espeland & Sauder, *supra* note 350, at 589 (highlighting “the actual and potential consequences of the rankings for diversity at three levels of analysis: 1) the *individual* decision-making of law school applicants; 2) the *organizational* decision-making of law schools in the admissions practices that create classes and distribute students across schools and programs; 3) and the heterogeneity of law schools as kinds of organizations with distinctive missions and niches in the *field of legal education*” (emphases added)); Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309 (2006) (looking at the impact of rankings on achieving a diverse student body). For a discussion of the overreliance on LSAT scores and its impact on diversity, see *supra* Part III.E.

372. One recent analysis estimated that the cost of producing a law review article by a tenured professor at a highly ranked school is in the range of \$100,000 and noted that 43% of law review articles are never cited by other academics, judges, or practicing lawyers. Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT’L L.J., Apr. 20, 2011, available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202490888822&Legal\\_scholarship\\_carries\\_a\\_high\\_price\\_tag&sreturn=1&hbxlogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202490888822&Legal_scholarship_carries_a_high_price_tag&sreturn=1&hbxlogin=1).

373. Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 56 n.281 (2002) (noting that “*U.S. News & World Report* [’s] rankings . . . do not consider quality of teaching as a factor worth evaluation”); Schuwerk, *supra* note 231, at 763 (“Once they are hired, law professors are rewarded primarily for scholarship.”).

374. Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1073 (2009).

375. See David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 999 (1991) (“If professors do not engage in scholarship, they cannot fully foster critical analytical skills in their students because their own skills will atrophy. Squandering these intellectual professional resources is inexcusable.”); Korobkin, *supra* note 363, at 423-24; James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers?*, 73 CHI.-KENT L. REV. 823, 827-29 (1998); Deborah



that their distance from the actual practice of law empowers them to engage in more objective critiques than would be possible while fully immersed in the enterprise of practicing law. In contrast, critics argue that academics ensconced in the ivory tower, wholly isolated from the vagaries of legal practice on the ground, have created a body of esoteric legal scholarship that is of little utility to the bench, the bar, and the students taught by these scholars.

Statistics support the claim that scholarship produced in the legal academy is cited with decreasing frequency by the judiciary, lending credence to the assertion that many scholars are essentially writing to the increasingly narrow and exclusive audience of other law school academics.<sup>376</sup> Moreover, the student-driven process of selecting law review articles and its attendant impact on a professor's career trajectory has been widely criticized.<sup>377</sup> One answer is to expand the definition of countable scholarship and de-privilege the identification of recondite topics as infinitely preferable to practical scholarship that is selected for its relevance to the world of practicing lawyers instead of the rarified ranks of academics.

Many suggestions aimed at addressing the inadequacy of legal education as currently conceptualized require intangible efforts and attention, unlike the quantifiable production of scholarly articles and presentation of these ideas to other academics. This is compounded by the lack of incentives for faculty to engage with students or adapt their pedagogy. Because efforts unrelated to scholarly output often go unnoticed and unrewarded, both financially and in terms of recognition, it sends a tacit message that these contributions to the life of the law school are devalued.<sup>378</sup> A reconstructed system that rewards both productive scholars and engaged and innovative teachers could redirect some energy into enhancing law school pedagogy over lengthening a list of scholarly output.<sup>379</sup> Tenure standards could be revised to incorporate the recognition of dedication and service to the law school. Another option is to lobby the omnipotent *U.S. News* to include in its indicia the quality and quantity of faculty contributions to the life of the law school, even though they may be more difficult to objectively

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Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765, 807 (1998); Fred R. Shapiro, *They Published, Not Perished, but Were They Good Teachers?*, 73 CHI.-KENT L. REV. 835, 840 (1998).

376. See generally David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761 (2005).

377. Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 584 (2008) (noting "that editors use author credentials extensively to determine which articles to publish").

378. See Newton, *supra* note 41, at 136.

379. This will be a hard sell for institutions when a large portion of the *U.S. News* reporting system is reputational and presumably based in large part on perceived scholarly quality. However, as discussed throughout the Article, the entire system must be reformed, given the interconnection between the component parts.

assess.<sup>380</sup>

*M. Equalize Status of Clinical, LRW, and Tenure Track Faculty*

The demand for expanded instruction in practical skills will be vindicated when all faculty members share equal status, salary, and voting rights in hiring, promotion, and tenure, as well as full participation in all curricular and institutional decisions.<sup>381</sup> Some schools have equalized and integrated their faculties, but in many schools, the balkanization of faculty continues to engender a destructive dynamic within the academy, and deep divisions persist among doctrinal, clinical, and LRW faculty. It is easy to retreat behind old narratives and perceived entrenched interests, wary and resentful of each other. The continued relegation of “skills faculty” to the margins of power within the academy stunts the conversation about educational reform since full participation in law school governance is critical.<sup>382</sup> This stratified structure sends an unmistakable message to students about what is valuable in the curriculum. Moreover, it is hard to measure the true cost of relegating clinical and writing faculty to a lower status, but demoralization certainly takes a toll. Eliminating the current hierarchy could instead transcend the divisions and redirect attention to the big picture that should be driving the conversation about law school reform—how to prepare our students to be competent, ethical, and satisfied lawyers. With a fully inclusive representation of legal educators at the table, faculty could work toward finding common ground. A collaborative reform effort wrought from multiple and occasionally tense and fragmented conversations might engender conditions in which the stakeholders truly listen, eschew defensiveness, contemplate, and perceive critiques about how educators function individually or institutionally not as personal attacks, but instead advanced in the spirit of truly open-minded dialogue in pursuit of meaningful reform. Skills and doctrinal faculty all bring important perspectives to this

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380. The temptation to fudge subjective data could threaten to render reporting completely unreliable, given the likelihood that law schools may feel they have no choice but to gin more objective data if they perceive that their competitors are engaging in similar dissembling. However, instruments such as student evaluations of faculty engagement may be possible. Some commentators have suggested that law schools should not strive to teach everything to all students, but instead to provide general training and then tailor curricula to particular focuses by creating niche law schools.

381. See Deborah Maranville et al., *Re-vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering* 50 (NYLS Clinical Research Inst., Working Paper No. 10/11-6), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1626568](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626568) (“At the same time, decisions made at the local level on status, job security, and voting rights in turn affect who will be in a position to participate in the national discussions on both personnel issues and curriculum.”).

382. It strikes me as ironic that doctrinal faculty do not question their ability to evaluate clinical teaching and scholarship despite the rich world of clinical pedagogy and a distinct body of clinical scholarship, yet in many institutions, clinical faculty cannot vote on hiring and retention of doctrinal faculty, an inequality that further skews and reinforces the power imbalance.



enterprise, but as currently structured, some voices are more equal than others.

Stiff resistance to equalization is due in part to ingrained assumptions about the relative value of the different work, and it is attributable in part to the relative expense of clinical education.<sup>383</sup> The intrinsic hierarchy of values can only be dismantled when faculty are forced to honestly examine deep-rooted assumptions, and it will be perhaps encouraged by a review of legal education. One response to the cost is reflected in the current threats to the hard-fought victory giving clinical faculty security of position,<sup>384</sup> which should serve as the miner's canary for doctrinal faculty. Schools should strenuously resist, mindful that the proposals may be genuinely motivated by an interest in ameliorating the financial burden that law students face, but the impact is far-reaching. If security of position provisions are repealed, whether with the demise of tenure for all professors or clinical faculty alone, the pressure will be to add experiential learning opportunities on the cheap, at the expense of the current educators in the trenches with the students.<sup>385</sup> Greater flexibility may be desirable, but concerns persist about consistent pedagogy and the long-term demoralization of clinical faculty who reside in those institutions.

Opposition to placing a premium on skills training includes: objections to the perceived costs; parrying from tenured faculty who are wedded to their research agendas; faculty resistance to learning new teaching methodologies when they have long ago mastered the old ones; disinterest in the labor-intensive demands of skills teaching; a lack of support for, or even overt hostility to, focusing on skills because they are derided as too pedestrian; the difficulty of developing assessment instruments designed to measure competencies that are not tested by standard examinations; pressure from *U.S. News* to attend to concrete inputs that are more readily and objectively measured; and the drive to increase institutional visibility and prestige through scholarly productivity.<sup>386</sup> Schools have enjoyed some increased funding for skills training, but this increase is typically accompanied by a parallel increase for research as well, which fails to address the underlying disparities or offset concerns about disproportionate resource allocation.<sup>387</sup>

#### *N. Respond to the Changing Nature of Practice*

Law schools are educating lawyers who will hone their skills in a world that may bear little resemblance to the one in which many faculty cut their teeth as practitioners, if they practiced at all. That our system of education has hardly

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383. *But see* Chavkin, *supra* note 293, at 13-14 (arguing that clinical education is not as expensive as is widely believed, particularly when compared to the relative cost of small seminars).

384. AM. BAR ASS'N, *supra* note 109, at 32 ("A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure.").

385. This discussion of security of position provisions is not intended to argue against tools for ensuring ongoing post-tenure productivity, but to raise concern about academic freedom and parity among faculty.

386. *See* Thies, *supra* note 51, at 612.

387. *Id.* at 612-13.

evolved to mirror the changes in practice over the past century is telling. It is incumbent on schools to carefully consider how legal education ought to be modified to reflect the needs of our students and a more contemporary legal marketplace.

Of particular relevance to the changing face of law school is the “death of big law.”<sup>388</sup> Law schools were historically driven in part to produce associates whose labor enriches law firms. Under the “big law” model, law firm partners generate significant profits by leveraging the labor of associates,<sup>389</sup> driving up costs for the consumers of high-price legal services. Because the tasks assigned to associates typically did not require sophisticated legal skills, law schools did not experience pressure to graduate students with a wide range of lawyering skills,<sup>390</sup> and “[l]aw schools shaped their curricula to respond to the needs of the corporate practice of large law firms.”<sup>391</sup> Changing times and the economic downturn have produced sophisticated and thrifty clients who are no longer willing to subsidize the legal training of associates<sup>392</sup> and who impose pressure for new associates to generate money in a way that adds value for the clients, not the firm partners.<sup>393</sup> As a result, some analysts contend that employers will prefer law school graduates who possess a range of practical skills.<sup>394</sup> The reconstructed model in big law may trickle down to other employers, who will follow suit in demanding practical skills, given the high price of training lawyers in-house. This trend may exert additional pressure on law schools to focus on the provision of skills training.

Another area that must be considered is generational learning preferences.<sup>395</sup> Millennials, the generational group from which the vast majority of current law students are drawn, have grown up in a world saturated with almost unimaginable and ever-advancing technological innovation. As a result, their style of learning and engagement has developed differently than those who came of age in a different era.<sup>396</sup> Legal educators must resist the temptation to duck their heads in

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388. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 813-14 (“Law schools will have to find education models that are more cost-effective and that address employer demands in the new market for law graduates.”).

389. Thies, *supra* note 51, at 600.

390. *Id.* at 602.

391. MACCRATE REPORT, *supra* note 1, at 87.

392. Burk & McGowan, *supra* note 126, at 78 (“As increasing numbers of sophisticated clients refuse to pay high rates for inexperienced lawyers, the debate about new lawyers’ practical preparation and who should be providing it has gotten louder and more pointed, though no clearer.”).

393. See Lat, *supra* note 125 (“Clients are balking at paying for junior associates, which raises a question: If clients will no longer pay for the training of junior associates, who will?”); see generally Thies, *supra* note 51 (outlining the reasons the traditional structure of law firms is not economically sustainable).

394. See Thies, *supra* note 51, at 600-02.

395. See, e.g., Campbell, *supra* note 100, at 282-83.

396. See Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 255 (2009); see also Leslie Larkin Cooney, *Giving*



the sand when it is challenging to keep pace with technological advancements and force themselves to adapt to student learning styles and the modernization of legal practice (e.g., electronic discovery, technology in the courtroom, depositions conducted remotely, and confidentiality issues associated with the use of this technology).

In an increasingly globalized world, schools must adapt their curriculum, pedagogy, and worldview to incorporate this reality. Strategies include the increased integration of issues related to the internationalization of law practice, the importance of providing instruction on cultural competence,<sup>397</sup> and the installation of awareness of the legal, economic, cultural, and political world beyond our borders. Even if schools do not expect the graduates of individual institutions to acquire jobs with obvious international connections, the influence of increased global interconnectedness will inevitably seep into almost all areas of practice.<sup>398</sup>

As professionals, law professors must address the widespread dissatisfaction among the public about the hostile way law is practiced, including the incalculable costs to perceptions of justice and fair play engendered by the current system. The concept that all disputes are litigable and all injuries compensable fuels a caustic cycle and often serves to perpetuate harm rather than foster the peaceable and enduring resolution of disputes. Introducing students to alternative dispute resolution and other problem-solving competencies early and often is critical before students have fully internalized the message sent throughout the first year—that conflicts should be resolved in zero-sum game litigation posture. Faculty must counter the first year curriculum's

overwhelming message . . . that real law and real lawyers maintain the status quo by resolving disputes between private parties. This message is built into the very fabric of the torts, contracts, property, and civil procedure courses, as they were designed by Langdell and his immediate successors, and as they continue to be taught at the present time.<sup>399</sup>

The students' educational experiences should fully embrace and incorporate exposure to the expanding range of alternative perspectives on law practice,<sup>400</sup>

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*Millennials a Leg-Up: How to Avoid the "If I Knew Then What I Know Now" Syndrome*, 96 KY. L.J. 505, 505 (2008) ("Millennial students are those born after 1981 and they are quite different from the Gen X students with whom legal educators are familiar.").

397. See Arturo J. Carrillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transnational Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527, 586 (2004) ("[M]ore law schools are realizing that the clinical training of transnational lawyers is an essential component of legal education in the age of globalization.").

398. See, e.g., Lauren Carasik, *"Think Glocal, Act Glocal": The Praxis of Social Justice Lawyering in the Global Era*, 15 CLINICAL L. REV. 55 (2008).

399. Edward Rubin, *Curricular Stress*, 60 J. LEGAL EDUC. 110, 111 (2010).

400. Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 433 (2005).

including multidisciplinary problem solving,<sup>401</sup> holistic lawyering,<sup>402</sup> collaborative lawyering,<sup>403</sup> therapeutic jurisprudence,<sup>404</sup> creative problem solving,<sup>405</sup> preventive law,<sup>406</sup> transformative mediation,<sup>407</sup> and restorative justice.<sup>408</sup>

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401. See V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83, 84 (2002) (arguing that “[c]lients dealing with complex and multidimensional problems need service providers who approach problem-solving in a way that is client-centered, client-empowering, and incorporates multidisciplinary and community-based solutions and resources”).

402. Holistic lawyering is defined as

“[a]n orientation toward law practice that shuns the rancor and bloodletting of litigation whenever possible; seeks to identify the roots of conflict without assigning blame; encourages clients to accept responsibility for their problems and to recognize their opponents’ humanity; and sees in every conflict an opportunity for both client and lawyer to let go of judgment, anger, and bias and to grow as human beings.”

Ingrid N. Tollefson, *Enlightened Advocacy: A Philosophical Shift with a Public Policy Impact*, 25 HAMLINE J. PUB. L. & POL’Y 481, 504-05 (2004) (citation omitted).

403. Collaborative lawyering is explained as follows:

The mission of collaborative law is “[t]o promote the non-adversarial practice of law. To promote collaborative law, which resolves legal conflicts with cooperative, rather than confrontational, techniques, and in which lawyers do not litigate—thereby encouraging parties to reach agreements in a creative and respectful manner. To educate the public and the legal community about the process and value of collaborative law.”

Cohen, *supra* note 306, at 156 n.73 (citation omitted).

404. Therapeutic jurisprudence

“[c]oncentrates on the law’s impact on emotional life and psychological wellbeing. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic and anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law’s role as a therapeutic agent should be recognized and systematically studied.”

*Id.* (citation omitted).

405. The Center for Creative Problem Solving, which is based at California Western School of Law, “develops curriculum, research, and projects to educate students and lawyers in methods for preventing problems where possible, and creatively solving those problems that do exist.” *Center for Creative Problem Solving*, CAL. W. SCH. OF LAW, [http://www.cwsl.edu/main/default.asp?nav=creative\\_problem\\_solving.asp&body=creative\\_problem\\_solving/home.asp](http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/home.asp) (last visited June 11, 2011).

406. “The National Center for Preventive Law (NCPL) is dedicated to preventing legal risks from becoming legal problems.” *National Center for Preventive Law*, CAL. W. SCH. OF LAW., <http://www.preventivelawyer.org/main/default.asp> (last visited June 11, 2011). The NCPL is also based at California Western School of Law and provides materials and information to those interested in the theories and practice of preventive law. *Id.*

407. In the transformative view, conflict is more about interactions than violations or conflicts



### *O. Impediments*

1. *Faculty Resistance*.—Some faculty members react defensively to the admonition to make legal education more relevant. Discussing the importance of integrating practical skills or other creative curricular reforms to their teaching repertoire can leave professors feeling irrelevant and antiquated, fueling resistance to reorienting their teaching so far into their careers—that is, “[r]eluctance to support curricular reform may in fact reveal some discomfort with curricular modifications that may make certain faculty members feel a lack of confidence in their ability to take part in new, more modern visions of law teaching.”<sup>409</sup> Moreover, faculty “may resist change because they prefer to replicate the environment in which they achieved success.”<sup>410</sup> Those arguing for an overhaul of the system should be mindful of the reasons for resistance and frame their arguments with an understanding of factors which may undergird the opposition. Overt criticisms of faculty who have not practiced law may be counterproductive in encouraging them to innovate their teaching to include methods more often used by those who teach the skills. Instead, disparate groups of faculty can stop trading recriminations, share the best teaching methodologies, demystify the various techniques and goals, and recognize that law students must merge doctrinal insights with practical knowledge and skills. Somehow, faculty need to foster a belief that the participants are all operating in good faith to advance legal education and engender dialogue that rejects old, ossified assumptions. Faculty members who are disengaged with the current crisis are not likely to be reading law review articles on pedagogy and legal education. Those concerned with reform need to reach out to their colleagues and create space for these conversations to take place in a non-accusatory, constructive, and collegial way, such as faculty colloquia. These suggestions may sound hopelessly naïve. Let me be clear, however, that I prefer a process of civil discourse, but I do not suggest that those agitating for reform temper the substance of our critique. Admittedly, these conversations will be threatening to some whose gravitational pull toward tradition is powerful.<sup>411</sup>

2. *Financial Issues*.—Even if law school administrations and faculties embrace reforms, the thorny issue of fiscal pressure can dampen or extinguish even the best of intentions. Competition for law students may increase in the near

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of interest. See *Institute for the Study of Conflict Transformation*, HOFSTRA LAW, [http://law.hofstra.edu/academics/institutesandcenters/ISCT/isct\\_resources.html](http://law.hofstra.edu/academics/institutesandcenters/ISCT/isct_resources.html) (last visited June 11, 2011).

408. As Beth Cohen notes, other approaches include restorative justice, “[a] systematic response to wrongdoing that emphasizes healing the wounds of victims, offenders, and communities caused or revealed by the criminal behavior.” Cohen, *supra* note 306, at 156 n.73 (citation omitted).

409. Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 GERMAN L.J. 717, 729-30 (2009).

410. Sonsteng et al., *supra* note 105, at 352.

411. A less nefarious cousin to refractory individual faculty is institutional inertia, which will only change when the affected constituencies persevere in challenging the status quo.

future. Assuming that undergraduate college applications peaked in the 2009 application cycle, four or six years down the road, law school applications will likely drop, perhaps precipitously. Compounding the demographic shifts are both the economic downturn and the publicity surrounding the questionable financial wisdom of attending law school. Some schools may be forced to shut their doors.<sup>412</sup> Although this may be appealing to prospective law students, fewer attorneys may exacerbate the inadequacy of legal resources for the poor and middle class. Moreover, because escalating pressures to prepare students to practice law through a reoriented focus on skills are often dismissed on account of fiscal constraints, any real dialogue about the mission of legal education is eclipsed by the bottom line.

Despite the barriers to forward progress, law school must evolve because legal practice has changed. In the face of opposition, some successful prior reform efforts have altered legal education in meaningful ways. For example, because of the vanishing trial, schools pay increased attention to alternative dispute resolution. The academy has absorbed other changes as well; critical pedagogies have contributed incalculably to our understanding of difference and the importance of developing cross-cultural competencies,<sup>413</sup> and the introduction of clinics into the law school curriculum (and their progress, albeit uneven, from the margins of the school to more established place) has been widely hailed as a critical advance. Schools have witnessed the introduction of more interdisciplinary approaches, and classes on interviewing, counseling, and negotiation are more readily available, although they are by no means ubiquitous. Some initiatives have prevailed over the initial resistance, but there is a long way to go. Reform may feel like a Sisyphean task, but doing nothing represents an abdication of our duty as legal educators.

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412. One possibility is that in this environment, some law schools will simply not be able to survive. The closure of some law schools would yield both positive and negative results. Closure would limit the number of graduates vying for the same jobs, perhaps making it easier for those who make the cut to secure employment, perhaps with an attendant salary increase associated with fewer candidates for jobs. In all likelihood, however, those denied entrance would come from the groups already underrepresented in law school, the bar, and the bench. Another downside is that fewer lawyers would be available to the public in an era when the poor and middle class have few legal resources at their disposal. Top law schools would not be at risk, so it would likely be independent law schools unconnected to a university capable of absorbing some of the financial burden that face closure. The losers would likely include schools that serve a predominantly local market and provide community-oriented lawyers. A further potential downside is that the decreased competition for students fostered by fewer slots might lessen the pressure on law schools to mold the education to student demands for relevancy of their education.

413. See Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER SOC. POL'Y & L. 161, 162 (2005); Kathryn M. Stanchi, *Step Away from the Case Book: A Call for Balance and Integration in Law School Pedagogy*, 43 HARV. C.R.-C.L. L. REV. 611, 612 (2008) (arguing that law school professors should "increase the number of courses that integrate doctrine, theory and skills so that students learn to use both doctrine and legal theory, including critical theory, in a practice context").



*P. The Gordian Knot*

The above suggestions are inextricably intertwined, sometimes obviously and at times more subtly. For example, the rising tuition and student debt cannot be remediated without considering the factors that make legal education so expensive and the emerging proposals to contain costs, a conversation that cannot take place outside the context of current efforts to implement potentially regressive regulatory reform, which in turn must be viewed in terms of their retrograde impact on the entire enterprise of legal education and the exacerbation of already significant structural inequities.<sup>414</sup> Access to justice cannot be advanced in isolation from institutional indifference to instilling a sense of professional commitment to public interest ideals. Further, it is related to efforts to increase diversity in law school and the attendant increase in lawyers committed to working in underrepresented communities that a diversified profession would bring—an effort that loops back again to crushing debt loads, which often foreclose the possibility of low-remuneration justice work. Student distress cannot be ameliorated without considering changes to our signature pedagogy, which must be evaluated for its efficacy in preparing students to practice law, especially when it is elevated over skills training and experiential learning, priorities that are representative of curricular and institutional policies that are influenced by the precarious status of skills faculty within the academy. The narrow and repetitive attention to sanitized, de-contextualized facts and analytical thinking is exacerbated by faculty reluctance to transmit ideals on issues of professionalism, ethics, and morals that are often obfuscated by the focus on value-neutral Socratic instruction. Grading methodologies both contribute to student distress and fail to provide meaningful and formative assessment, but they must be viewed in the context of bar preparation, itself a questionable goal given the test's inability to identify and measure the competencies necessary for lawyering. All of these factors are refracted through the prism of the *U.S. News* rankings, a singularly destructive tool when assessed in light of its impact on legal education. In essence, the seemingly disparate factors cannot be easily disaggregated, since they are entangled as part and parcel of the whole enterprise of legal education. Nothing short of a radical reorientation will remediate the complex set of factors that work synergistically to create the current crisis.<sup>415</sup>

Perhaps the biggest impediment to meaningful reform is the potentially insurmountable challenge of motivating academics to act against their own

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414. See *supra* Part I.E.

415. I reluctantly acknowledge that change may be incremental rather than radical, given the conservative nature of our institutions. That reality should not deter us from articulating the ideal reforms, because if we concede and internalize the futility of real change, the vision we embrace will already be compromised. We should delay pragmatic considerations for later. If we adopt even some of these suggestions, they may help to generate institutional change. Even small changes can create a meaningful and measurable difference for individual law students and their future clients.

perceived self-interest in maintaining the status quo. It is not my intent to assert a blanket indictment of law professors and their underlying intentions—they reflect in large part the institutions to which they belong. While I repeatedly and emphatically question our motivations and conclusions, I believe that some of the individual and institutional tendencies toward self-preservation are not conscious and deliberate, but rather uncritical. That said, we must challenge the blind adherence to the dogma of current legal pedagogy without demonizing those who subscribe to its tenets. The prevailing confidence in the fundamental wisdom of our current system must be evaluated by something other than the vigor of the beliefs underlying it. Although there is a difference in intent between actively obstructing change and passively hindering reform with inertia, the end result is the same. If we stand by and do nothing, we are complicit in this deteriorating system. If we just cobble together piecemeal reforms that cohere only in their unwillingness to challenge the status quo, meaningful reform will be effectively obstructed. I am not alone in feeling increasingly agitated about this enterprise and my role in it, and I would welcome an open, engaged, expansive, and inclusive conversation in which we genuinely step outside our personal and institutional interests to figure out what is best for the students,<sup>416</sup> the profession, and the society in which the law operates.<sup>417</sup>

### CONCLUSION

Legal education is at a critical crossroads.<sup>418</sup> Most commentators, even those who argue that the time is ripe to transform legal education, are not sanguine about the prospects of meaningful change. Given legal education's history of successfully thwarting reforms, observers are justifiably cynical about generating any groundswell of support for reorienting our institutions. Admittedly, the barriers are enormous and perhaps insurmountable, especially if legal educators continue to resist engaging in unflinching introspection about our mission and methods. While this Article proposes sweeping changes that are likely to be dismissed as quixotic, we must make an effort to engender these conversations not just on a national level among the most vociferous interested parties, but also at the level of institutional discourse, and even through individual conversations in the hallways. Law professors can be impassioned, resolute, and outspoken, but they often fail to leaven their opinions with humility and introspection. We must question our own assumptions and open our minds to think charitably about the positions espoused by others instead of silencing or marginalizing dissenters.

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416. As one of the largest stakeholders in this enterprise, students should also be invited to participate in this dialogue.

417. I concede discomfort with threads of my discussion. Some ideas, proposed with the best intentions of reform aimed at the students, could easily be hijacked and backfire. For others, I merely identify something that needs to be examined and changed, without suggesting a particular solution, in part because the considerations are complex and the answers opaque.

418. For many schools, the current crisis will not represent an existential threat. For other schools, the risk is real, and those schools face a stark choice: they can either sit at the helm and navigate through necessary reforms, or they can focus on rearranging deck chairs.



We must articulate with brutal honesty the depth and breadth of the problems and acknowledge that our own self-interest colors our perceptions. We can resort to unproductive and antagonistic finger-pointing, demand incontrovertible empirical evidence and an appealing bottom line before we take reform seriously, and cling tenaciously to a tradition which serves us, but no longer serves our students. Alternatively, we can work diligently to overcome faculty resistance to venturing out beyond our comfort zones.

For those determined to widen the lens through which we view reform, it would be a shame if we ceded our demands for meaningful reform at the outset and settled out of the box for less contested change instead of mobilizing attention and resistance to the current crisis. Only after we are able to shake the foundation of legal education should we seek common ground to rebuild legal education from its roots. Consensus is a messy, frustrating, and at times alienating process, but the underlying principle suggests that the process builds alliances among former adversaries, opens minds, and ultimately yields a more sustainable result with broader buy-in from the diverse constituencies. Law professors, known to be a combative bunch, will never unanimously subscribe to a revamped, uniform pedagogy, however elegantly articulated, but refusal to participate in good faith makes those resisting change unwitting accomplices in maintaining the much maligned status quo. In order to embark on this process, we must be willing to examine the entire enterprise. The inextricable interconnection among many of the malfunctioning components demands nothing less than a wholesale reevaluation of our current system. Integrity compels us to speak truth to power, even if it is not for the faint of heart. Perhaps this is the perfect storm to motivate long overdue, enduring change that inures to the benefit of our students, the legal system, and the bedrock principle of equal justice under law.

THE “TURNING-OUT” OF BOYS IN A MAN’S PRISON:  
WHY AND HOW WE NEED TO AMEND THE  
PRISON RAPE ELIMINATION ACT

JAMES E. ROBERTSON\*

Ian Manuel was sentenced to die in prison for a non-homicide that occurred when he was 13. When he arrived at prison processing in Central Florida, he was so small that no prison uniform fit him. “He was scared of everything and acting like a tough guy as a defensive mechanism,” said Ron McAndrew, then the assistant warden. “He didn’t stand a chance in an adult prison.”<sup>1</sup>

TABLE OF CONTENTS

Introduction ..... 819

I. Boys Doing Adult Time ..... 821

II. It Wasn’t a Real Rape! ..... 825

    A. *The Odds Against Rape* ..... 825

    B. *“Turning-Out” Boy Prisoners* ..... 829

III. The Bad Men of *Farmer v. Brennan* ..... 834

IV. Boy Prisoners and the PREA ..... 840

V. The Turn-Out Amendment to the PREA ..... 843

    A. *A Strict Liability Statutory Cause of Action* ..... 844

        1. Elements ..... 844

        2. Rationale ..... 845

        3. Objectives ..... 846

            a. Maximum deterrence ..... 846

            b. Fairness ..... 847

    B. *PLRA Exemptions* ..... 847

        1. Exhaustion Requirement ..... 848

        2. Physical Injury Requirement ..... 849

    C. *Guardians Ad Litem* ..... 850

Conclusion ..... 851

INTRODUCTION

As a boy entering a prison housing adults in 1978, T.J. Parsell faced long odds against living a dignified life behind bars. He came up way short; within

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1. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 12 (2007), available at <http://www.eji.org/eji/files/20071017/cruelandunusual.pdf>.



twenty-four hours into his confinement in Michigan State Prison, four inmates repeatedly raped the once defiant boy prisoner. After they had their way with the seventeen-year-old, they flipped a pink token to determine who “owned” him.<sup>2</sup>

Earlier, a prison psychologist had told him the facts of life for boy prisoners:

“A pretty boy like you,” the psychologist added, “you’ll need to get a man.”

“F . . . *that!*” I said, my eyes darted to the floor. I could feel my face burning.

“If you don’t get a man, you’ll be open game.”

“They’ll have to kill me first,” I said, sitting up in my chair.

“That can be arranged,” he said, calmly.<sup>3</sup>

By the last count, some 8500 boys under age eighteen stand in the shoes of T.J. Parsell: they too were sentenced to serve “adult time” in county jails and state prisons.<sup>4</sup> Like Parsell, they entered a prison subculture that equates sexual aggression with masculinity, and weakness and passivity with femininity.<sup>5</sup> Unlike Parsell, however, they reside in a prison that Congress promised will exercise “zero tolerance” of sexual assault when it enacted the Prison Rape Elimination Act (PREA).<sup>6</sup>

Will the next generation of boys confined in a man’s prison share Parsell’s fate? This Article argues that as things stand now, many of them will serve out their sentences as neither boys nor men. Like Parsell, these unfortunates will have their gender socially reconstructed by being “turned out”—coerced into having sex, which supposedly can “[change] a person’s sexual habits from heterosexual to homosexual.”<sup>7</sup> As Parsell learned, a new inmate who cannot or

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2. T.J. PARSELL, *FISH: A MEMOIR OF A BOY IN A MAN’S PRISON* 86-94 (2006).

3. *Id.* at xi.

4. See *infra* notes 13-14 and accompanying text (delineating the number of boy prisoners). The term “boy prisoners” designates men under age eighteen at the commission of their offenses who were tried as adults and sentenced as adults to jails, state prisons, or federal prisons.

5. See *infra* notes 84-116 and accompanying text (discussing the social construction of boys as punks).

6. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15602(1) (2006) (formerly the Prison Rape Reduction Act of 2002).

7. WILLIAM K. BENTLEY & JAMES M. CORBETT, *PRISON SLANG: WORDS AND EXPRESSIONS DEPICTING LIFE BEHIND BARS* 60 (1992); see also HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* 17 (2001), available at <http://www.hrw.org/legacy/reports/2001/prison/report.html> (“Prisoners refer to the initial rape as ‘turning out’ the victim.”). David, a victim of repeated prison rapes, described his sexual “reorientation” as follows:

I am a very confused person now, sexually that is, because I am insecure about what is naturally combined with what I’ve been through and seen with my own eyes . . . I am attracted to younger guys because of their innocent look and naïve personalities, more so because it’s that very innocence that I was robbed of.

VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 74 (Thomas J. Bernard & Richard McCleary eds., 1996).

will not protect his manhood becomes a “punk,”<sup>8</sup> a non-man of sorts and surely a humiliating, scorned gender assignment.<sup>9</sup>

Boys sentenced to a man’s prison deserve better. Toward that end, this Article drafts an amendment to the PREA designed to offset the underprotection of boy prisoners that the Article attributes to the Eighth Amendment<sup>10</sup> and the extant provisions of the PREA. Part I of this Article explores why and how juvenile boys are transferred to adult court for trial and, upon conviction, sometimes incarcerated with adult males. After calculating the odds of a boy prisoner being sexually assaulted, Part II describes the process of “turning” boy prisoners into punks. Part III contends that the United States Supreme Court has left boy prisoners underprotected. After critiquing the PREA and the standards proposed by the United States Department of Justice for implementing its goal of “zero tolerance” of prison rape, Part IV concludes that the Act will also leave boy prisoners underprotected from the subcultural forces that “turn” inmates. Part V advances a remedy for these underprotected boys, a “turn-out” amendment to the PREA. The proposed amendment (1) creates a new federal cause of action providing for strict liability when boys experience sexual abuse and sexual harassment in a man’s prison; (2) exempts boys bringing this cause of action from two key provisions of the Prison Litigation Reform Act;<sup>11</sup> and (3) mandates the appointment of a guardian ad litem for every boy prisoner who would monitor his welfare and have standing to initiate and represent his interests in litigation.

## I. BOYS DOING ADULT TIME

Since being incarcerated in an adult prison, this boy [“Brown Sugar,” who was age fifteen when he entered the adult criminal justice system] has been repeatedly raped. He was forced to prostitute himself in exchange for protection from physical beatings and sexual assault by

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8. See PARSELL, *supra* note 2, at 57; Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111, 115 (Don Sabo et al. eds., 2001) (“A prisoner is either a ‘real man’ who subdues and rapes an adversary, or he is a ‘punk.’”); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. LAW & CRIMINOLOGY 127, 156 (2001) (“The ‘punk’ is usually a heterosexual male who submits to sexual acts, after initial resistance and eventual force. These inmates are turned into ‘punks’ after rape (often gang rape), convincing threat of rape, or intimidation. Once a prospective ‘punk’ is raped, other inmates promptly brand him a continual target for future sexual attack.” (internal citations omitted)).

9. See *infra* note 110 and accompanying text (describing “punks” as persons at the bottom of the prison gender order). Punks can be categorized among the prison’s “non-men.” See HANS TOCH, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* 224 (rev. ed. 1992) (describing “weak” men in prison as “nonmen”).

10. The Eighth Amendment, in relevant part, prohibits “cruel and unusual punishment[.]” U.S. CONST. amend. VIII.

11. Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).



other inmates. His “protectors” forced him to have their names tattooed on his body to signify their ownership of him. Prison guards target him for beatings and harassment because of the sexual relationships into which he has been forced. His nickname, “Brown Sugar,” is one of the prison tattoos that brand him as a victim of repeated and ongoing sexual abuse.<sup>12</sup>

In mid-year 2009, Brown Sugar was one of 2778 state prisoners under age eighteen, of whom 2644 were boys.<sup>13</sup> His counterparts in county jails numbered 5847.<sup>14</sup> Kids like Brown Sugar give new meaning to American exceptionalism; “researchers at the LBJ School in Austin were unable to find any instance anywhere in the modern world where a child as young as twelve or thirteen received a multi-decade sentence in adult prison.”<sup>15</sup>

Between 1985 and 2004, 175,000 children under age eighteen,<sup>16</sup> of whom 703 were under age twelve and 961 were age thirteen,<sup>17</sup> came under the criminal jurisdiction of courts reserved for adults. These courts acquired jurisdiction through so-called transfer statutes. Every state, as well as the District of Columbia, has this type of statute.<sup>18</sup> The least common transfer statute, present in fifteen states, grants prosecutors the discretion to try kids as if they are adults for certain offenses.<sup>19</sup> By contrast, in twenty-eight states, legislation mandates that certain charges be transferred to adult court.<sup>20</sup> Lastly, forty-six states vest juvenile courts with the power to transfer certain categories of cases into adult courts.<sup>21</sup> The Supreme Court in *Kent v. United States*<sup>22</sup> set forth eight “determinative factors”—such as “seriousness of the alleged offense”, “prosecutive merit of the complaint”, “sophistication and maturity of the

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12. EQUAL JUSTICE INITIATIVE, *supra* note 1, at 15.

13. HEATHER C. WEST, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 24 tbl.21 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

14. TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 16 tbl.12 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>.

15. Michael E. Tigar, *What Are We Doing to the Children?: An Essay on Juvenile (In)justice*, 7 OHIO ST. J. CRIM. L. 849, 851 (2010).

16. MICHELE DEITCH ET AL., UNIV. OF TEX. AT AUSTIN, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 29 (2009), available at <http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf>.

17. *Id.* at xiii.

18. DANIELLE MOLE & DODD WHITE, CHILD WELFARE LEAGUE OF AM., TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM 5 (2005), available at <http://www.cwla.org/programs/juvenilejustice/jjtransfer.pdf>.

19. *See id.* at 8-9.

20. *See id.* at 9.

21. *See id.* at 6.

22. 383 U.S. 541 (1966).

juvenile”, and “[t]he record and previous history of the juvenile”—in a juvenile court’s decision whether to waive jurisdiction.<sup>23</sup>

Regardless of how youngsters enter the adult criminal justice system, they overwhelmingly share one critical characteristic—their sex. Referenced in a recent literature review,<sup>24</sup> a 2005 study found that males comprised all but 5% of transferees.<sup>25</sup> Several other studies have demonstrated that the more extensive a prior record, the more likely a boy was to be transferred.<sup>26</sup> Yet in sorting out who will serve adult time, race matters; a 2008 national study determined that African-Americans made up 62% of all transferees.<sup>27</sup> Moreover, another study concluded that this racial disparity persisted after controlling for the severity of the offense.<sup>28</sup>

The odds favor transferred boys “doing time,” and lots of it. Most studies showed high conviction rates—approximately 80% in some jurisdictions.<sup>29</sup> A study encompassing nineteen states found that 43% of transferees received prison sentences, and another 20% got jail time.<sup>30</sup> Furthermore, long sentences awaited the transferees. A national study published in 2008 reported an average sentence of ninety months behind bars.<sup>31</sup> Some 40% of the transferees received more than seventy-two months.<sup>32</sup> Whether there is a disparity between the sentence and the time served awaits a conclusive answer.<sup>33</sup>

Whereas federal law mandates sight and sound separation of children locked up under state juvenile court jurisdiction or federal court jurisdiction,<sup>34</sup> only seventeen states and the District of Columbia provide separate housing for offenders classified as “juveniles,” an expansive category that includes youthful adults.<sup>35</sup> According to a recent study, “many states no longer take . . . [a transferee’s] age into consideration when deciding where the child is to be housed

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23. *Id.* at 566-67.

24. See UCLA SCH. OF LAW JUVENILE JUSTICE PROJECT, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM: A REVIEW OF THE LITERATURE (2010), available at <http://www.campaignforyouthjustice.org/documents/UCLA-Literature-Review.pdf> [hereinafter UCLA JUVENILE JUSTICE PROJECT].

25. See *id.* at 7.

26. See *id.* at 8.

27. See *id.* at 9.

28. See *id.* at 11.

29. See *id.* at 13.

30. See *id.* at 16.

31. See *id.* at 21. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Supreme Court held that a sentence of life “without possibility of parole” for a juvenile sentenced as an adult for the non-capital crime of robbery committed at age sixteen constituted cruel and unusual punishment as proscribed by the Eighth Amendment. See *id.* at 2030. The ruling indicated that child felons could serve out a life sentence as long as there existed “some realistic opportunity to obtain release.” *Id.* at 2034 (emphasis added).

32. See UCLA JUVENILE JUSTICE PROJECT, *supra* note 24, at 21.

33. See *id.* at 23.

34. See Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 (2006).

35. DEITCH ET AL., *supra* note 16, at 58.



before trial and after sentencing.”<sup>36</sup>

The “adultification” of the criminal justice system hit full stride by the mid-1980s, when a steep increase in youth homicides occurred.<sup>37</sup> A supposed onslaught of youthful “super-predators,” a phrase that Feld characterized as “a code word for harsher treatment of young black males,”<sup>38</sup> led to legislation resulting in the transfer of more boys and girls into adult criminal courts.<sup>39</sup> Consequently, the number of kids under age eighteen serving state prison time mushroomed from just over 2000 in 1985 to 5400 in 1997.<sup>40</sup> Largely because of plunging juvenile crime rates,<sup>41</sup> their ranks thinned by some 50% by mid-year 2009.<sup>42</sup> Nonetheless, Benekos and Merlo have concluded that “[d]espite declining juvenile crime rates, the adultification of youth continues to include punitive and exclusionary sanctions.”<sup>43</sup>

The certification of thousands of juveniles has done little to deter criminality. Regarding specific deterrence,<sup>44</sup> a review of six large-scale studies concluded that kids sentenced in adult courts for violent crimes experienced higher recidivism rates than similar offenders sentenced in juvenile courts.<sup>45</sup> Their greater offending rates suggested a hardened criminal identity born partly from exposure to the prison subculture.<sup>46</sup> Regarding general deterrence,<sup>47</sup> the studies reported either a modest deterrent effect or none at all.<sup>48</sup>

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36. *Id.* at 53.

37. See Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189, 231 (2007).

38. *Id.* at 253-54.

39. See *id.* at 216-17.

40. See KEVIN J. STROM, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, PROFILE OF PRISONERS UNDER AGE 18, 1985-1997, at 1 (2000).

41. See Alida V. Merlo & Peter J. Benekos, *Is Punitive Juvenile Justice Policy Declining in the United States? A Critique of Emergent Initiatives*, 10 YOUTH JUST. 3, 3 (2010).

42. Compare STROM, *supra* note 40, at 1 (tallying 5400 state prisoners under age eighteen in 1997), with SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.6.39.2009, available at <http://www.albany.edu/sourcebook/pdf/t6392009.pdf> (tallying 2778 state prisoners under age eighteen in 2009).

43. See Peter J. Benekos & Alida V. Merlo, *Juvenile Justice: The Legacy of Punitive Policy*, 6 YOUTH VIOLENCE & JUV. JUST. 28, 28 (2008).

44. Specific deterrence addresses the deterrence of a particular person. See generally RICHARD HAWKINS & GEOFFREY P. ALPERT, AMERICAN PRISON SYSTEMS: PUNISHMENT AND JUSTICE 141-62 (1989).

45. See Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., June 2010, at 1, 2, available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

46. See *id.* at 7.

47. General deterrence refers to the impact of potential penalties on the public at large. See generally HAWKINS & ALPERT, *supra* note 44.

48. See Redding, *supra* note 45, at 2.

## II. IT WASN'T A REAL RAPE!

### A. *The Odds Favoring Rape*

“[R]esearch concerning prison sexual victimization,” observed Tonisha Jones and Travis Pratt, “has been both sparse and fraught with methodological inconsistencies. As a result, debate continues to rage concerning the prevalence of prison sexual victimization.”<sup>49</sup> The rate of officially reported cases—2.91 per 1000 adult inmates in 2006<sup>50</sup>—provides fodder for that debate because many sexually abused inmates do not report their victimization.<sup>51</sup> Indeed, a study of Nebraska inmates found that some 50% did not confide in anyone, with a mere one in ten telling medical staff.<sup>52</sup> Some inmates fail to report their victimization because doing so would transgress the subcultural norm against “ratting,”<sup>53</sup> a

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49. Tonisha R. Jones & Travis C. Pratt, *The Prevalence of Sexual Violence in Prison: The State of the Knowledge Base and Implications for Evidence-Based Correctional Policy Making*, 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 280, 281 (2008); see also Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 379 (2000) (observing that “after decades of research, social scientists have yet to agree on what percentage of incarcerated men experience coercive sexual contact”).

50. See ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 3 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf> [hereinafter BECK ET AL., SEXUAL VIOLENCE REPORTED]. In juvenile facilities, the sexual victimization rate was 16.8 per 1000 children. See ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY JUVENILE CORRECTIONAL AUTHORITIES, 2005-06, at 2 tbl.1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrjca0506.pdf>.

51. Helen M. Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers’ Attitudes Toward Rape in Prison*, 69 PRISON J. 39, 47 (1989) (finding that 72.9% of correctional officers believed that raped inmates will not report their victimization); see also *Smith v. Norris*, 877 F. Supp. 1296, 1304 (E.D. Ark. 1995) (quoting an unpublished July 1991 report by the Civil Rights Division of the United States Department of Justice, which stated that “[s]ince rapes are almost always accompanied by threats of retaliation, if the victim tells staff, one wonders how many rapes occurred that were *not* reported—the victim preferring to find safety *via* some other mechanism within the inmate culture”).

52. See Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 74 (1996).

53. *United States v. Montes-Diaz*, 208 F. App’x 565, 566 (9th Cir. 2006) (holding that “the district court did not abuse its discretion in admitting the challenged inmate code of silence evidence”); *Skinner v. Lampert*, 457 F. Supp. 2d 1269, 1282 (D. Wyo. 2006) (referencing “a culture of silence—sometimes referred to as a ‘code of silence’—that prevented administrators from ostensibly knowing much of what was happening at the [p]enitentiary”); *Alberti v. Heard*, 600 F. Supp. 443, 450 (S.D. Tex. 1984) (writing that “it is apparent that the inmates have an unwritten code of silence which results in most of the acts of violence going undetected”); *Grubbs v. Bradley*, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982) (finding that “the evidence is absolutely clear that the inmate code exists and that it prevents the reporting of a great many episodes of actual or threatened violence”).



despised breach of the inmate code.<sup>54</sup> Others remain quiet out of shame because, according to Human Rights Watch, there is a “terrible stigma” attached to prison rape.<sup>55</sup> And to make matters worse, as one court explained, victims perceive the reporting process as “degrading and humiliating.”<sup>56</sup>

Anecdotal evidence about the prevalence of prison rape is chilling and has been for many years. For instance, a federal district judge in 1996 charged that “[i]n general, inmate rape and assault is pervasive in this country’s prison system.”<sup>57</sup> “What we cannot blink away,” commented Charles Fried a year later, “is the astonishing prevalence [of prison rape] . . . .”<sup>58</sup> In 1999, Victor Hassine, a prisoner himself, observed that “[s]exual assaults . . . have become unspoken, *de facto* parts of court-imposed punishments.”<sup>59</sup> As we entered the twenty-first century, Human Rights Watch’s *No Escape: Male Rape in U.S. Prisons* portrayed prison rape as a predicable feature of male incarceration.<sup>60</sup> Similarly, I wrote, “While the [men’s] prison has missed the mark in rehabilitating inmates and reducing crime rates through deterrence or incapacitation, *it has come of age in one endeavor—promoting sexual terrorism.*”<sup>61</sup>

What is a sound, empirically-based estimate of prison sexual abuse rates? Jones and Pratt examined a host of studies and concluded that the “good studies,” which used an “inclusive definition of sexual violence,” reported victimization

54. *United States v. Bailey*, 444 U.S. 394, 426 n.6 (1980) (Blackmun, J., dissenting) (remarking that an inmate’s life “isn’t worth a nickel” if he reports his rape) (quoting R. GOLDFARB, *JAILS: THE ULTIMATE GHETTO* 325-26 (1975)); *Withers v. Levine*, 615 F.2d 158, 160 (4th Cir. 1980) (stating that “[t]here was evidence, however, that many more such [prison sexual] assaults go unreported because the victim is usually threatened with violence or death should the incident be reported”); *Smith v. Ullman*, 874 F. Supp. 979, 985 (D. Neb. 1994) (noting that naming one’s assailant is an act of snitching, a practice “often brutally discouraged in the general [prison] population”); Raymond G. Kessler & Julian B. Roebuck, *Snitch*, in *ENCYC. OF AMERICAN PRISONS* 449, 449 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (explaining that snitches are “hated and despised . . . and may be the object of violent reprisal[s]”).

55. HUMAN RIGHTS WATCH, *supra* note 7, at 131.

56. *LaMarca v. Turner*, 662 F. Supp. 647, 686 (S.D. Fla. 1987), *aff’d in part*, 995 F.2d 1526 (11th Cir. 1993).

57. *Webb v. Lawrence Cnty.*, 950 F. Supp. 960, 965 (D.S.D. 1996) (citing *Martin v. White*, 742 F.2d 469, 472 (8th Cir. 1984)); *cf.* *Young v. Quinlan*, 960 F.2d 351, 362 (3d Cir. 1992) (describing repeated assaults by “a succession of cellmates . . . most likely because of . . . [the inmate’s] youthful appearance and slight stature”).

58. Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U.L. REV. 681, 682-83 (1997).

59. VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 134 (Thomas J. Bernard & Richard McCleary eds., 2d ed. 1999).

60. HUMAN RIGHTS WATCH, *supra* note 7, at 4-5.

61. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 439-40 (2003) (internal citations omitted) (emphasis added).

rates of around 20%.<sup>62</sup> This finding is not inconsistent with the legislative findings of the PREA,<sup>63</sup> which posited that “experts have conservatively estimated that at least 13% of the inmates in the United States have been sexually assaulted in prison.”<sup>64</sup>

On a twelve month basis, the most recent National Inmate Survey of Sexual Victimization in Prisons and Jails for 2008-09 found that 4.4% of prison inmates and 3.1% of jail inmates of both sexes reported one or more instances of sexual victimizations involving staff and inmates.<sup>65</sup> For males, the inmate-on-inmate victimization rates stood at 1.9% and 1.3% for prisons and jails, respectively; and the staff-on-inmate victimization rates were 2.9% and 2.1% for prisons and jails, respectively.<sup>66</sup>

What are the odds for boy prisoners? Anecdotal accounts almost universally portray juveniles doing adult time as easy and frequent sexual prey. In the 1830s, after visiting many early prisons, one observer discerned “one general fact . . . boys are prostituted to the behest of old convicts.”<sup>67</sup> Some 140 years later, in their groundbreaking book *Terror in the Prisons*, Carl Weiss and David Friar observed that “youth is hit the hardest” among the victims of prison sexual abuse.<sup>68</sup> Later, Justice Blackmun issued his frequently quoted assessment that “[a] youthful inmate can expect to be subjected to homosexual gang rape his first night in jail.”<sup>69</sup> Equally telling, surveyed correctional officers strongly agreed that “it is a very common occurrence for young straight boys to be turned out, or forced into being punks”<sup>70</sup> and that among all inmates, “forced or pressured sexual encounters are very common.”<sup>71</sup> Similarly, the court in *Schwenk v. Hartford* concluded, “It is well-documented . . . that young, slight, physically weak male inmates, particularly those with ‘feminine’ physical characteristics, are routinely raped, often by groups of men.”<sup>72</sup>

Nonetheless, a 1997 report lamented the “dearth of [empirical] data” on the

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62. Jones & Pratt, *supra* note 49, at 289; *cf.* Eigenberg, *supra* note 51, at 47 tbl.3 (finding that 50.6% disagreed that rape is rare and another 35.5% of the officers strongly disagreed).

63. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601-09).

64. 42 U.S.C. § 15601(2) (2006).

65. See ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, at 5 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>.

66. See *id.*

67. DAVID M. HEILPERN, FEAR OR FAVOUR: SEXUAL ASSAULT OF YOUNG PRISONERS 63 (1998) (quoting Rev. Louis Dwight).

68. CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 74 (1974).

69. *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

70. See WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 203 (1982).

71. *Id.* at 202.

72. *Schwenk v. Hartford*, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) (citing sources).



sexual abuse of boys behind bars.<sup>73</sup> The same could be said today, given that the National Inmate Survey of Sexual Victimization in Prisons and Jails for 2008-09 did not include prisoners under age eighteen.<sup>74</sup> An earlier Bureau of Justice Statistics study found that persons under age eighteen accounted for 4% of all substantiated instances of inmate-on-inmate sexual violence (1% in prison and 13% in jail).<sup>75</sup> However, just as inmates as a group underreport sexual assault, one would anticipate the same from boy prisoners.

The congressional findings in support of the PREA posited that “[j]uveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.”<sup>76</sup> It appears that legislators took that prevalence rate from a 1989 study.<sup>77</sup> The multiple of five was derived from responses to the following question: “Has anyone attempted to sexually attack or rape you?”<sup>78</sup> The 1989 study found that nearly 10% of juveniles incarcerated in adult prisons, as compared to some 2% in juvenile facilities, reported a sexual attack or rape.<sup>79</sup>

If we embrace the assumption of the PREA’s drafters that boy prisoners are at far greater risk of sexual victimization than those in juvenile facilities, then what is the current rate of sexual victimization in juvenile facilities? The most recent (2008-09) survey by the Bureau of Justice Statistics found that 12% of surveyed youth (91% being male) reported sexual victimization by other juveniles or staff in the last twelve months, or since their incarceration if less than twelve months.<sup>80</sup> Most involved staff (10.3%), 95% of whom were female, rather than fellow children (2.6%).<sup>81</sup>

In the absence of current and “spot-on” empirical data, we should assume that boy prisoners can readily walk in the shoes of the kids described by Victor Hassine, a well-regarded observer of imprisonment. As Hassine described it, “My current cellmate has been serving a life sentence in an adult facility since he

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73. JUSTICE POLICY INST., THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS 1 (1997), available at [http://www.justicepolicy.org/images/upload/97-02\\_REP\\_RiskJuvenilesFace\\_JJ.pdf](http://www.justicepolicy.org/images/upload/97-02_REP_RiskJuvenilesFace_JJ.pdf).

74. BECK ET AL., *supra* note 65, at 6.

75. BECK ET AL., SEXUAL VIOLENCE REPORTED, *supra* note 50, at 35 tbl.5.

76. 42 U.S.C. § 15601(4) (2006); see also NAT’L CRIM. JUSTICE REFERENCE SERV., NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 16 (2009), available at <http://www.ncjrs.gov/pdffiles1/226680.pdf> (concluding that “[j]uveniles in confinement are much more likely than incarcerated adults to be sexually abused, and they are particularly at risk when confined with adults”).

77. Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989).

78. *Id.* at 10 tbl.5.

79. *Id.*

80. ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, at 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>.

81. See *id.* at 1.

was 14, and I personally know a dozen or more men who were 16 when they first came to prison . . . . [M]ost teenage inmates do in fact become victims, and that victimization usually begins or ends with rape.”<sup>82</sup>

### B. “Turning-Out” Boy Prisoners

The kids I know of here are kept in the hospital part of the prison until they turn 16. Then they are placed in general population. At age 16, they are just thrown to the wolves, so to speak, in population. I have not heard of one making it more than a week in population without being “laid.”<sup>83</sup>

Being “laid” is a telling term. It suggests a sexual act but not a rape—at least not a “real rape.” In the prison subculture, it is hard to find a victim of a real rape. Based upon interviews with 564 randomly selected inmates in thirty prisons, Mark Fleisher and Jessie Krienert concluded that inmates perceive prison rape as “rare” and that none of the 564 inmates acknowledged being a victim of sexual violence.<sup>84</sup> Real rapes are rare because, according to Fleisher and Krienert, the “sexual worldview” prevalent among prisoners “allows a wide berth of sexual freedom” with “rape . . . on the margin of what otherwise would be culturally permissible sexual behavior.”<sup>85</sup> Thus, “[n]o matter how an institution assesses a sexual assault, inmate culture has its own cultural criteria to determine if a sexual assault was rape.”<sup>86</sup> These subcultural criteria place boy prisoners in great peril. It is not by chance that the punk, the inmate type whose victimization falls outside the definition of a “real” rape,<sup>87</sup> possesses characteristics that coincide with the expected characteristics of the boy prisoner<sup>88</sup>—that is, “the youngest prisoners, small in size, [and] inexperienced in personal combat.”<sup>89</sup>

Three types of sexual assailants await the boy prisoner. The “rapist” uses violence to achieve his sexual desires but will retreat if resisted.<sup>90</sup> By contrast, the “turn-out artist[’s]” stock-in-trade is coercion rather than brute force<sup>91</sup>—the

82. HASSINE, *supra* note 7, at 114.

83. Joanne Mariner, *The Latest Trend in Child Sexual Exploitation: Rape in Adult Prisons*, FINDLAW (Jan. 25, 2001), <http://writ.news.findlaw.com/mariner/20010125.html> (quoting an unnamed inmate).

84. Kim Curtis, *A Disputed Study Claims Rape Is Rare in Prison*, USA TODAY, Jan. 17, 2006, [http://www.usatoday.com/news/nation/2006-01-17-prison-rape\\_x.htm](http://www.usatoday.com/news/nation/2006-01-17-prison-rape_x.htm).

85. MARK S. FLEISHER & JESSIE L. KRIENERT, *THE CULTURE OF PRISON SEXUAL VIOLENCE* 139 (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf>.

86. *Id.* at 169.

87. See *infra* notes 111-16 and accompanying text (discussing why punks are denied victim status).

88. There are no empirical data on the physical characteristics of boy prisoners.

89. Stephen “Donny” Donaldson, *A Million Jockers, Punks, and Queens*, in *PRISON MASCULINITIES* 118, 119, *supra* note 8.

90. FLEISHER & KRIENERT, *supra* note 85, at 142-43.

91. See *id.* at 140.



latter being a prerequisite for "real" rape in prison.<sup>92</sup> Fleisher and Krienert described the "turn-out artist[']s" technique as follows: "A turn-out artist has smooth social and talking skills and coaxes, often in a matter of days, his prey into a sexually compromising situation; a new inmate[] who accepts a chocolate bar or stamps or joins a friendly card game has enjoined a debt that must be repaid."<sup>93</sup> Finally, the "bootie bandit" displays characteristics of both the rapist and the turn-out artist; his preference is sexual violence, and he has the will to use it.<sup>94</sup> On the other hand, he possesses social skills that make him particularly adept at hustling boy prisoners.<sup>95</sup>

The inmate subculture dictates that men of all ages must preserve their manhood in the face of aggression. The boy prisoner should heed the following advice of an inmate indoctrinated into this subculture:

Well, the first time . . . [a potential sexual aggressor] says something to you or looks wrong at you, have a piece of pipe or a good heavy piece of two-by-four. Don't say a damn thing to him, just get that heavy wasting material and walk right up to him and bash his face in and keep bashing him till he's down and out, and yell loud and clear for all the other cons to hear you, "Motherf . . . er, I'm a man, I came in here a motherf . . . ing man and I'm going out a motherf . . . ing man. Next time I'll kill you."<sup>96</sup>

Jack Henry Abbott likely heard advice of this sort before he entered an adult prison.<sup>97</sup> In *In the Belly of the Beast*, he described how he avoided becoming a punk:

The first prisoner—a middle-aged convict—who tried to f . . . me, I drew my knife on. I forced him to his knees, and with my knife at his throat, made him perform fellatio on my flaccid penis . . . .

. . .

It was inevitable then that a youth in an adult penitentiary at some point will have to attack and *kill*, or else he most certainly will become a punk . . . . If he cannot protect himself, someone else will.<sup>98</sup>

Unlike Abbott, many boy prisoners are ill-prepared for what awaits them. The National Prison Rape Commission knew this fact of prison life all too well when explaining, "Juveniles are not yet fully developed physically, cognitively, socially . . . [or] emotionally and are ill-equipped to respond to sexual advances

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92. See *id.* at 83-104 (reporting study findings).

93. *Id.* at 140.

94. See *id.* at 143.

95. See *id.* at 143-44.

96. PIRI THOMAS, *DOWN THESE MEAN STREETS* 267 (1967).

97. See JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 7 (1981) (describing his "long stints" in juvenile detention, followed by confinement from age twelve to age eighteen at the Utah State Industrial School for Boys and, shortly after his release, his imprisonment in the Utah State penitentiary).

98. *Id.* at 79.

and protect themselves. Younger teenagers and preteens, in particular, are unprepared to cope with sexualized coercion or aggression from older, more experienced youth or adult corrections staff . . . .”<sup>99</sup>

Facing sexual harassment—which is often a precursor to sexual assault<sup>100</sup>—or threats of sexual aggression from rapists and bootie bandits, boy prisoners may unwittingly welcome turn-out artists eager to extend them protection,<sup>101</sup> loans,<sup>102</sup> or some other form of assistance—and who will later demand repayment through sexual submission.<sup>103</sup> Their predicament could mirror that of Tico, whom inmate-author Piri Thomas portrayed as the embodiment of a new, youthful, and naïve inmate who had become acquainted with turn-out artist Rube:

He kept on looking at the concrete walk and his face grew red and the corners of his mouth got a little too white. “Piri, I’ve been hit on already,” he said . . . .

“Well, I got friendly with this guy named Rube.”

Rube was a muscle bound degenerate whose sole ambition in life was to cop young kids’ behinds. “Yeah,” I said, “and so . . . .”

“Well, this cat has come through with smokes and food and candy and, well, he’s a spic like me and he talked about the street outside and about guys we know outside and he helped me out with favors . . . .”

*My God*, I thought, *what can I tell him?* . . . . Rube would use that first time to hold him by threatening to tell everybody that he screwed him. And if anybody found out, every wolf in the joint would want to cop . . . and he’d be a jailhouse punk.<sup>104</sup>

99. NAT’L CRIM. JUSTICE REFERENCE SERV., *supra* note 76, at 142-43.

100. See James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 14-15 (1999) (discussing patterns of sexual harassment, which include feminizing a targeted inmate and communicating aggressive intentions); see also Notice of Proposed Rulemaking, National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6251 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115), available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_nprm.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf) (characterizing sexual harassment as a “precursor” of sexual abuse) [hereinafter PREA Notice of Proposed Rulemaking].

101. See, e.g., *Payne v. Collins*, 986 F. Supp 1036, 1048 n.18 (E.D. Tex. 1997) (finding the existence of inmate violence by virtue of fact that inmates pay “protection money,” which “usually assumes the form of either goods . . . or participation in homosexual acts”); Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 420-21 (2000) (describing how inmates find “protectors,” who later threaten them unless sexual payments are given).

102. See Helen M. Eigenberg, *Homosexuality in Male Prisons: Demonstrating the Need for a Social Constructionist Approach*, 17 CRIM. JUST. REV. 219 *passim* (1992) (describing how aggressive inmates provide “gifts” to new naïve inmates and then demand “payment or else”).

103. See, e.g., HASSINE, *supra* note 7, at 72 (“I was playing chess for money and lost several times, and it became like a 20- or 30-dollar debt. I couldn’t immediately cover it. I was given a choice, either borrow it or have sex with him.”).

104. THOMAS, *supra* note 96, at 265-66.



The boy prisoner in Tico's situation has three options. First, he can follow Abbott's example by assaulting his tormentor, preemptively if need be.<sup>105</sup> Second, he can request transfer to protective custody, which is sometimes derisively called "punk city" because its population includes non-men.<sup>106</sup> Finally, he can compromise his body, and by doing so, he will have been turned out.

Upon being turned out, the boy prisoner will acquire an overriding master status<sup>107</sup>—that of a punk. His socially constructed new identity will be a spoiled one because, as two long-time inmates of Louisiana's notorious Angola Prison explained, turning-out "strip[s] the male victim of his status as a 'man,'" leaving him feminized in an inmate social world that embraces hypermasculinity,<sup>108</sup> which in turn equates manhood with the capacity to dominate others.<sup>109</sup> No longer is he a boy among men; he has become a non-man residing at the bottom of the prison gender order.<sup>110</sup> Correspondingly, his fellow inmates will not see

105. See James E. Robertson, *"Fight or F..." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV. 339, 346 (1995).

Correctional officers also view target-initiated violence as a legitimate form of self-defense. One inmate recounted:

I asked Sergeant [sic] Brown. And he told me to go ahead, "Pick up the nearest thing around you and hit him in the head with it. He won't bother you no more." I went over to another sergeant and I asked him and he said, "Pick up the nearest damn thing to you and just hit him with it, that is all." I looked at him and I said, "All right. If I do this I ain't going to get locked up for it, am I?" He looks at me and he says, "No." Because I am using self-defense.

*Id.* (internal citations omitted).

106. See James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 111 (1987) (explaining that "vulnerable inmates who resist transfer have concluded that the social stigma attached to being in protective custody as well as its more restrictive conditions of confinement outweigh the dangers awaiting them in the general prison population" (internal citations omitted)).

107. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 33 (1963) (defining "master status" as one that "will override most other status considerations").

108. See WILBERT RIDEAU & RON WIKBERG, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 75 (1992). As the court in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), observed, "[t]he victims of these attacks are frequently called female names and terms indicative of gender animus like 'pussy' and 'bitch' during the assaults and thereafter." *Id.* at 1203 n.14.

109. See Robertson, *supra* note 61, at 440-41.

Ironically, men rape other men in prison to validate their masculinity. The prison rapist lives in an environment that perversely encourages sexual assault by equating manhood with domination and femininity with subservience. Accordingly, most sexual aggressors define themselves as heterosexual, if not as "real men." Moreover, the structure of prison life constantly assaults one's manhood, denying respite to sexual aggressors and only further victimizing their prey.

*Id.* (internal citations omitted).

110. See, e.g., Man & Cronan, *supra* note 8, at 156 (noting that "[p]unks" are relegated to the lowest class of inmates"); Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the*

him as a legitimate victim. Within the prison subculture, a “blame the victim” mentality prevails.<sup>111</sup> Moreover, inmates will interpret his sexual behavior as a “fair exchange,”<sup>112</sup> with sex being traded for some commodity, be it protection or debts.

Nor will the persons duty-bound to protect boy prisoners necessarily regard him as a legitimate victim. About 25% of surveyed correctional officers did not consider sexual activity arising from subtle threats of force to constitute a real rape.<sup>113</sup> Even sexual activity in response to overt threats of harm failed to satisfy more than 25% of surveyed officers that a real rape had occurred.<sup>114</sup> Also, in finding that staff in the Texas prison system routinely failed to safeguard “youthful first offenders forcibly raped,” the court in *Ruiz v. Johnson*<sup>115</sup> revealed that Texas officers’ perceptions of punks mirrored those held by inmates:

A TDCJ captain who testified for the defendants about protection matters stated that he disbelieved an inmate’s threat of harm from sexual assault after the inmate told him that the inmate had been forced to perform sexual acts with two different inmates. The reason the captain refused to acknowledge the threat of harm to the inmate was because the inmate had not physically fought against his attackers after they threatened him with physical harm.<sup>116</sup>

### III. THE BAD MEN OF *FARMER V. BRENNAN*

Following the demise of the hands-off doctrine during the 1960s,<sup>117</sup> federal

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*Sexualization of Power in Prison*, 10 GEO. MASON U. C.R. L.J. 291, 303 (2000) (“At the bottom of the hierarchy are ‘punks’ . . .”).

111. FLEISHER & KRIENERT, *supra* note 85, at 144 (“Prison culture’s worldview assumptions are predicated on physical and mental weakness, a ‘blame the victim’ sexual victimization philosophy, and antipathy toward victims’ pain and suffering.”).

112. *See id.* at 142.

113. *See* Helen M. Eigenberg, *Correctional Officers’ Definitions of Rape in Male Prisons*, 28 J. CRIM. JUST. 435, 442 (2000) (“About three-fourths (74 percent) of the officers believed it was rape when an inmate threatened to identify another inmate as a snitch in order to secure sexual acts.”).

114. *See id.* (“Likewise, most officers . . . defined the situation as rape when an inmate was forced to choose between paying off a debt with sexual acts or receiving a beating.”).

115. 37 F. Supp. 2d 855, 860 (S.D. Tex. 1999), *rev’d*, 243 F.3d 941 (5th Cir. 2001). As recently as the 1970s, some commentators characterized what is regarded today as coerced sex as “seduction.” *Cf.* Eigenberg, *supra* note 113, at 437-38 (citing commentators writing between 1951 and 1975).

116. *Ruiz*, 37 F. Supp. at 926 (internal citations omitted).

117. Lower federal courts have offered a host of justifications for the hands-off doctrine. *See, e.g.,* *Bethea v. Crouse*, 417 F.2d 504, 505 (10th Cir. 1969) (“We have consistently adhered to the so-called ‘hands off’ policy . . .”); *Douglas v. Sigler*, 386 F.2d 684, 688 (8th Cir. 1967) (“[C]ourts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases.”); *Sutton v. Settle*, 302 F.2d 286, 288 (8th Cir. 1962) (“[C]ourts have no



courts have extended a host of constitutional rights to inmates.<sup>118</sup> Yet punks have

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power to supervise . . . such institutions.”); *Powell v. Hunter*, 172 F.2d 330, 331 (10th Cir. 1949) (“The prison system is under the administration of the Attorney General . . . and not of the district courts.”); *Sarshik v. Sanford*, 142 F.2d 676, 676 (5th Cir. 1944) (per curiam) (“The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.”); *United States ex rel. Yaris v. Shaughnessy*, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) (“[I]t is unthinkable that the judiciary should take over the operation of . . . prisons.”); see also SCOTT CHRISTIANSON, *WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA* 252 (1998) (stating that prior to the late 1960s, “Americans’ constitutional rights effectively stopped at the prison gate”); Eugene N. Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 669 (1966) (observing that the constitutional status of prisoners is “the most neglected area” of correctional law).

Several factors led to the collapse of the hands-off doctrine: (1) attorneys committed to prison reform; (2) prison disturbances and riots that exposed the severe shortcomings of the penal system; and (3) the Supreme Court’s commitment to advancing the rights of powerless minority groups. See LYNN S. BRANHAM & SHELDON KRANTZ, *CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS’ RIGHTS* 282-83 (5th ed. 1997).

118. Lower federal courts, not the Supreme Court, initially drove the expansion of prisoners’ rights. See, e.g., *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975) (addressing the classification of inmates); *Knell v. Bensinger*, 489 F.2d 1014, 1018 (7th Cir. 1973) (addressing the discipline of inmates); *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972) (addressing inmates’ medical care); *Corby v. Conboy*, 457 F.2d 251, 253 (2d Cir. 1972) (addressing inmates’ access to the courts); *Sostre v. McGinnis*, 442 F.2d 178, 202 (2d Cir. 1971) (addressing freedom of speech), *overruled by Davidson v. Scully*, 114 F.3d 12 (2d Cir. 1997); *Walker v. Blackwell*, 411 F.2d 23, 28-29 (5th Cir. 1969) (addressing religious freedom); *Collins v. Schoonfield*, 344 F. Supp. 257, 272-73 (D. Md. 1972) (addressing prison rules); *Sinclair v. Henderson*, 331 F. Supp. 1123, 1129-31 (E.D. La. 1971) (addressing physical exercise).

The Supreme Court’s rulings, however, have long since controlled prisoners’ rights. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 483-85 (1995) (holding that procedural safeguards arise when disciplinary sanctions are a “dramatic departure from the basic conditions [of the sentence]” or impose “atypical and significant hardships”); *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that deliberate indifference to a significant risk of inmate-on-inmate assault constitutes cruel and unusual punishment); *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (holding that malicious use of force by prison or jail staff inflicts cruel and unusual punishment); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (holding that deliberate indifference to basic human needs may constitute cruel and unusual punishment); *Thornburgh v. Abbott*, 490 U.S. 401, 419 (1989) (holding that inmates possess a limited right to receive publications); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350-51 (1987) (holding that inmates possess a limited right to religious freedom); *Turner v. Safley*, 482 U.S. 78, 91 (1987) (holding that inmates possess a limited right to receive and send correspondence); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (holding that although inmates possess no reasonable expectation of privacy, they remain protected against cruel and unusual punishment); *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (holding that transferring inmates to mental hospitals triggers procedural safeguards); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (holding that pretrial detainees cannot be punished); *Bounds v. Smith*, 430 U.S. 817, 828-29 (1977) (holding that

just as much to fear. Human Rights Watch's *No Escape: Male Rape in U.S. Prisons* largely blames prison staff, contending that they "do little to stop [sexual assault]." <sup>119</sup> Earlier studies said the same, <sup>120</sup> with one social scientist reporting that correctional officers "[i]n the prison vernacular . . . seem to offer little assistance to inmates except the age-old advice of 'fight or f . . .'" <sup>121</sup>

Courts are to blame as well. The district court in *Smith v. Ullman* <sup>122</sup> had this to say: "The courts, if indeed they are serious about decrying violence in the nation's prisons, might reexamine the court-created Eighth Amendment jurisprudence *which tolerates* that violence." <sup>123</sup> The jurisprudence in question has a clear lineage, one leading to *Farmer v. Brennan*. <sup>124</sup>

*Farmer's* facts involved inmates sexually assaulting a transsexual prisoner. <sup>125</sup> Transsexuals' standing in the prison population bears comparison to that of "turned-out" boy prisoners in that both fall far short of the "real" man status so prized in prison and thus become non-men by representing femininity. However, they do so in different ways; the transsexual has physically altered her body, <sup>126</sup> whereas the inmate subculture has socially constructed the boy prisoner as a

inmates possess a right of meaningful access to the courts); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs" inflicts cruel and unusual punishment); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (holding that procedural safeguards are triggered by threatened loss of good time—that is, the reduction of the inmate's time served based on a statutory formula for crediting good behavior); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (holding that inmates possess a limited right to practice religion); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (holding that "jailhouse lawyers" possess limited constitutional protection); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (per curiam) (holding that racial segregation in prison violates equal protection except in emergencies).

119. HUMAN RIGHTS WATCH, *supra* note 7, at 143.

120. See, e.g., LEE H. BOWKER, PRISON VICTIMIZATION 13 (1980) (observing that some correctional staff "tell them to fight it out"); TOCH, *supra* note 9, at 208 (observing that prison staff "advise inmates of the advantages of using violence when one is threatened"); see also *LaMarca v. Turner*, 995 F.2d 1526, 1533 (11th Cir. 1993) ("When alerted to specific dangers, prison staff often looked the other way rather than protect inmates. Rather than offer to help, the staff suggested that the inmates deal with their problems 'like men,' that is, use physical force against the aggressive inmate.").

121. Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Male Rape and Their Willingness to Respond to Acts of Rape*, in PRISON VIOLENCE IN AMERICA 145, 159 (Michael C. Braswell et al. eds., 2d ed. 1994).

122. 874 F. Supp. 979 (D. Neb. 1994).

123. *Id.* at 986 (emphasis added).

124. 511 U.S. 825 (1994).

125. See *id.* at 829-30.

126. See Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 632 (1998) (explaining that "recognizable physical traits place transgendered prisoners in substantial danger, and put officials on notice of an imminent and substantial risk to the prisoners" (internal citations omitted)).



punk.<sup>127</sup>

The *Farmer* decision reaffirmed that the deliberate indifference test applied to conditions of confinement in general and to prison sexual abuse in particular. In keeping with its earlier decision in *Wilson v. Seiter*,<sup>128</sup> the Court specified that this test has objective and subjective components. Regarding the objective component, Justice Souter's majority opinion explained that a risk of harm must be, "objectively, 'sufficiently serious.'"<sup>129</sup> The *Farmer* Court proceeded to characterize "deliberate indifference" as the subjective component, requiring proof that the defendant staff member actually "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."<sup>130</sup>

Justice Souter's majority opinion did include an addendum that marginally aids plaintiffs. First, actual knowledge embraces instances where the risk is so obvious that the defendants "must have known" of the perils facing the plaintiff.<sup>131</sup> Second, a substantial risk of harm can arise when "all prisoners in . . . [the plaintiff's] situation face such a risk."<sup>132</sup>

Nonetheless, the burden upon victims of sexual assault has since been a daunting one.<sup>133</sup> The "must have known" addendum establishes two inferential hurdles for plaintiffs to clear: first, the official must have had "aware[ness] of facts from which the inference [of excessive risk] could be drawn"; and second, the official "*must also draw the inference.*"<sup>134</sup> Consequently, the defendant will

127. See *supra* notes 83-116 and accompanying text (discussing the social construction of boy prisoners as punks).

128. 501 U.S. 294 (1991).

129. *Farmer*, 511 U.S. at 835 (quoting *Wilson*, 501 U.S. at 298).

130. *Id.* at 847.

131. See *id.* at 842.

Whether a prison official had the requisite knowledge of a substantial risk is . . . subject to . . . [proof] in the usual ways, including inference from circumstantial evidence . . . . For example, if a[ ] . . . plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

*Id.* (internal citations omitted).

132. *Id.* at 843.

133. See James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 431 (2003) (arguing that by distinguishing what prison staff "ought" to know from their "actual" knowledge, the first prong subtly "re-align[ed]" the Eighth Amendment prohibition of cruel and unusual punishment "in a way favorable to [defendant] prison officials."); Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 1, 6 (2008) (arguing that establishing such awareness is usually a very difficult task).

134. *Farmer*, 511 U.S. at 837 (emphasis added).

avoid liability, despite knowing the underlying facts, if he or she “unsoundly” concluded that the risk “was insubstantial or nonexistent.”<sup>135</sup>

By adopting the subjective criminal standard of recklessness, the *Farmer* Court required a culpable state of mind on the part of the defendant prison officer. In so doing, the Court implicitly adopted a deontological model: “From this perspective . . . victimization is bilateral and individuated because it is defined in terms of ‘concrete, individual acts by identifiable transgressors.’ Accordingly, ‘[a] victim is someone injured by someone else . . . not the society as a whole . . . .’”<sup>136</sup> Stated plainly, this is a “bad man” model of cruel and unusual punishment, in which a readily identifiable and criminally culpable person inflicts harm under color of state law.

By contrast, turning-out a boy works a different form of victimization, occurring in a different realm of the prison experience and based upon a different form of power. Being turned out is relational. As one commentator observed of gender relations outside of prison, “Gender refers to the social construction of power relations between women and men, and the implications these relations hold for the identity, status, roles and responsibilities of women (and men).”<sup>137</sup> All-male prisons are no less gendered than their female counterparts—being turned out is a process of being socially constructed as a punk, giving rise to the adage that “fags are born,” whereas “punks are made.”<sup>138</sup> As in the outside world, sexual identity in prison is a verb rather than a noun.<sup>139</sup> Stephen Donaldson, himself a one-time prison punk (also known as “Donny the Punk”), put it best in observing that the inmate subculture “fuses sexual and social roles and assigns all prisoners accordingly.”<sup>140</sup>

As demonstrated by the social construction of the boy prisoner “turned” punk, relational power arises from a cluster of relations that exist outside the bureaucratic prison but inside its subterranean core. Relational power is, as Hannah Arendt wrote, “never the property of an individual; it belongs to a group

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135. *Id.* at 844.

136. James E. Robertson, *A Punk’s Song About Prison Reform*, 24 PACE L. REV. 527, 545 (2004) (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 421 (1988) (citation omitted)); cf. Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 115 (2007) (describing the Court’s Eighth Amendment jurisprudence as one of “tidy categories, legal fictions, and hollow phrases”).

137. Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of Canadian Guidelines*, 19 INT’L J. REFUGEE L. 169, 211 (2007) (quoting Nahla Valji & Lee Anne De La Hunt, *Gender Guidelines for Asylum Determination*, UNIV. CAPETOWN LEGAL AID CLINIC 1, 6 (1999)).

138. See Robertson, *supra* note 136, at 528 n.7 (“Punks are distinguished from ‘fags,’ who are ‘true’ homosexuals. Hence, it is said that punks are ‘made’ while fags are ‘born.’”).

139. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 90 (2002) (“Gender is not a noun; gender is a verb—a process, a practice, a tool for marking and enforcing the bounds of gender within social structures such as the workplace, the state, and other institutions.”).

140. Donaldson, *supra* note 89, at 118.



and remains in existence only so long as the group keeps together.”<sup>141</sup> The group, in this instance, consists of prisoners; they express themselves collectively through the inmate subculture. Created primarily by the deprivations of imprisonment as well as imported values,<sup>142</sup> the inmate subculture functions as a distorted reproduction of the larger social order, especially inter-male power relationships. Consequently, as I have argued before, “[r]elational power in prison privileges hypermasculine attributes by constructing various male and female roles and then subordinating the latter.”<sup>143</sup>

Moreover, relational power is ongoing, as illustrated by the boy prisoner who has been socially constructed as a punk. His new identity is not episodic; it defines him to others and becomes part of the ongoing relational hierarchy. By contrast, the *Farmer* Court’s deliberate indifference standard is episodic, “arising,” as a commentator wrote,

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141. HANNAH ARENDT, ON VIOLENCE 44 (1970); see also Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721, 742 (1996) (“It is a contingent product of common ways of understanding and living in a social world, a function of reciprocally enacted roles, routines, institutions and understandings.”).

142. See Robertson, *supra* note 136, at 535-37.

The symbiotic relationship between masculinity and dominance originates in cultural worlds occupied by inmates prior to and during their incarceration. The inmate population largely reflects Western norms, which instruct males that masculinity must be aggressively acquired by controlling people and resources. Also, much of the prison population had been raised in lower class subcultures that equate aggressiveness and domination with manly virtues. Imprisonment further fuels the need to affirm masculinity by subjecting inmates to an emasculating environment. What Sykes called the “pains of imprisonment”—deprivations of liberty, autonomy, goods and services, personal safety, and contact with heterosexual female companions—represent “a set of threats or attacks which are directed against the very foundations of the prisoner’s being [as a man].” Foremost, the lack of heterosexual relationships deprives inmates of a reference for defining masculinity and experiencing the status and power it bestows. In addition, the many official rules governing when to eat, sleep, and otherwise partake of daily life represent “a profound threat to the prisoner’s self image because they reduce the prisoner to the weak, helpless, dependent status of childhood.”

*Id.* (internal citations omitted); see also, e.g., Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions*, in THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch eds., rev. ed. 1988) (“[V]ictories in the field of battle reassure the winners of their competence as human beings in the face of the passivity enforced by institutional regulations. This is particularly important for prisoners whose masculinity is threatened by the conditions of confinement.”); Kevin N. Wright, *The Violent and Victimized in the Male Prison*, in PRISON VIOLENCE IN AMERICA, *supra* note 121, at 103, 119 (“The literature suggests that prison violence is related to the threat incarceration poses to the individual’s identity and particularly his sense of masculinity.”); Carolyn Newton, *Gender Theory and Prison Sociology: Using Theories of Masculinities to Interpret the Sociology of Prisons for Men*, 33 HOW. J. CRIM. JUST. 193, 197 (1994) (“[T]he prisoner’s masculinity is in fact besieged from every side. . .”).

143. Robertson, *supra* note 136, at 535.

only when . . . [staff] happen to notice possible threats to prisoners' well-being. On such a standard, conditions cannot be judged cruel even when prison officials fail to notice risks that any reasonably attentive prison official, mindful of his duty to ensure the provision of prisoners' basic needs, would have noticed and addressed.<sup>144</sup>

For boy prisoners in danger of being turned out, *Farmer's* deliberate indifference test focuses on the mental state of the defendant officer rather than the state's complicity in operating an institution that privileges hypermasculinity. Justice White, prior to *Farmer*, identified the failings of this deontological model: "Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time . . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system."<sup>145</sup>

While the odds often favor the rape of a boy prisoner, they rarely favor his proving deliberate indifference by his keepers. The plaintiff in *Webb v. Lawrence County*<sup>146</sup> would likely agree. He was not a boy prisoner, but at age nineteen, standing 5'4" and weighing in at a mere 120 pounds, he could have passed for one.<sup>147</sup> At some point in county jail, he was celled with a prisoner who had been convicted of raping a minor.<sup>148</sup> Moreover, come nightfall, when the prisoners were locked down, security was woefully lacking in the maximum security section housing the plaintiff. The only surveillance camera could not see inside cells.<sup>149</sup> Scheduled visual checks by attending officers occurred every thirty minutes, providing ample time for a rape.<sup>150</sup> Moreover, the plaintiff alleged that jailers in fact entered this section once a day.<sup>151</sup> What followed was hardly unpredictable. According to the plaintiff's allegations, his cellmate raped him repeatedly, but he said nothing until four days after the initial assault for fear of his cellmate's retaliation.<sup>152</sup> Finally, he managed to slip his keepers a note, and in short order, they moved him elsewhere.<sup>153</sup> In his suit, he alleged the obvious: "his youth, physical size, and status as a new admittee" should have alerted the defendant jailers that celling him with a child rapist made his rape foreseeable.<sup>154</sup> Yet the Eighth Circuit affirmed the summary judgment handed down by the district court. Although the circuit panel agreed that the defendant jailers had

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144. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 945 (2009).

145. *Wilson v. Seiter*, 501 U.S. 294, 310 (1991) (White, J., concurring).

146. 144 F.3d 1131 (8th Cir. 1998).

147. *See id.* at 1133.

148. *Id.*

149. *Id.*

150. *See id.*

151. *Id.*

152. *Id.* at 1134.

153. *Id.*

154. *Id.*



“general” knowledge that “rape and assault is pervasive in this nation’s prison system” and that his cellmate was a sex offender, such knowledge did not satisfy the subjective prong of the deliberate indifference test.<sup>155</sup> According to the panel, the missing link was the lack of evidence showing that the defendants actually drew the inference that this particular cellmate presented an “excessive risk” to this particular victim.<sup>156</sup>

#### IV. BOY PRISONERS AND THE PREA

In 2003, Congress unanimously enacted the PREA amid a chorus of denunciation of the prisons that tolerated the sexual abuse of prisoners.<sup>157</sup> Its enactment lacked modern precedent. The passage of the PREA defied the received truth among some prisoners’ rights advocates that only the judiciary will safeguard inmates from abuse.<sup>158</sup> Indeed, the Act sets forth an ambitious nine-point agenda:

- (1) establish[ing] a zero-tolerance standard for . . . prison rape . . . ;
- (2) [making] the prevention of prison rape a top priority . . . ;
- (3) develop[ing] and implement[ing] national standards for the detection, prevention, reduction, and punishment of prison rape;
- (4) [increasing] the available data and information on the incidence of prison rape . . . ;
- (5) [standardizing] the definitions used for collecting data on the incidence of prison rape;
- (6) [increasing] the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
- (7) protect[ing] the Eighth Amendment rights of Federal, state, and local prisoners;
- (8) [increasing] the efficiency and effectiveness of federal expenditures through grant programs . . . ; and
- (9) [reducing] the costs that prison rape imposes on interstate

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155. *Id.* at 1135.

156. *See id.*

157. *See* James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act of 2003*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 2-7 (2004) (discussing the origins of the PREA).

158. *Cf.* Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 361 (2006) (“The Framers viewed the judicial branch, unlike its counterpart branches, as the ultimate forum for protecting individual and minority rights from unfounded infringement by the majority.”). *But see* Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 13 (2005) (“Constitutional law and political science scholars have actively criticized countermajoritarian discourse. Their critiques center primarily upon two fault lines . . . First, the countermajoritarian critics exaggerate the extent to which the ‘political’ branches respond to majoritarian interests. Second, the critics fail to recognize the numerous majoritarian influences upon Court doctrine.” (internal citations omitted)).

commerce.<sup>159</sup>

The PREA came into being because of a timely confluence of policy entrepreneurs “discovering” prison rape.<sup>160</sup> Prominent conservatives, including evangelicals such as Charles Colson,<sup>161</sup> expressed their dismay over prison rape, blaming prison staff for what Eli Lehrer described in 2002 in the *National Review* as “epidemic” levels of prison rape.<sup>162</sup> Later that year, Human Rights Watch issued its comprehensive and damning report, *No Escape: Male Rape in U.S. Prisons*.<sup>163</sup> It received extensive coverage in the popular media.<sup>164</sup>

Does the PREA speak to boy prisoners “turned” into punks? Professor Ristroph’s insightful critique of the Act bodes ill for punks.<sup>165</sup> First, she faults the PREA as “a mostly hortatory statute, seemingly intended primarily to express condemnation of physically violent sexual aggression.”<sup>166</sup> Moreover, Professor Ristroph argues that

[t]he PREA assumes a “bad man” (a very, very bad man) account of prison rape: there is a clear aggressor and a clear victim, and the aggressor is an evil and brutal character who deserves still further punishment. Prison rape, like all rape and indeed all crime, is a problem that can be traced to individual agency, to the evil choices of a particular individual. This description of the problem of prison rape and its corresponding solutions do not question, and in fact reassert, the basic logic and legitimacy of the prison.<sup>167</sup>

Finally, she asserts that the “bad man” feature of the PREA is at odds with most prison sex.<sup>168</sup> She correctly portrays prison sex as mostly nonviolent and the product of the duress arising from institutional forces that leave inmates with little control over their lives and create stark inequalities in their ranks.<sup>169</sup>

How does her critique fare in 2011 with regard to boy prisoners? The Act’s

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159. 42 U.S.C. § 15602 (2006).

160. See Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 J. LEGIS. 129, 129 (2006) (noting “a unique coalition of civil rights groups and religious organizations that pressed prison rape onto Congress’[s] agenda”).

161. See Chuck Colson, *God’s Surprises: The Influence of C.S. Lewis*, BREAKPOINT (May 27, 1998), <http://www.breakpoint.org/commentaries/4814-gods-surprises>.

162. Eli Lehrer, *No Joke*, NAT’L REV. ONLINE (June 20, 2002), <http://www.nationalreview.com/comment/comment-lehrer062002.asp>.

163. HUMAN RIGHTS WATCH, *supra* note 7.

164. See Robertson, *supra* note 157, at 6 (“*No Escape* became a catalyst for mainstream media coverage of prison rape.”).

165. Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006).

166. *Id.* at 175.

167. *Id.* at 183 (internal citation omitted).

168. See *id.* at 154-56.

169. See *id.* at 156; see also *supra* note 142 (discussing the emasculating aspects of imprisonment).



admirable goal—“zero tolerance” of prison sexual abuse<sup>170</sup>—will not easily be achieved by the means at hand—that is, by data collection and the writing of standards. The need for empirical data is manifest given that the Act references a dated 1989 study as to the likelihood of sexual victimization.<sup>171</sup> Subsequent data collection has done little to address this matter, with the latest victimization survey having been administered exclusively to inmates age eighteen or older.<sup>172</sup>

The U.S. Department of Justice’s proposed PREA standards,<sup>173</sup> with their emphasis on education, classification, and monitoring, have promise but for three major shortcomings. First, the standards are truly a “no frills” affair; the PREA prohibits the establishment of any national prevention standards that “would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.”<sup>174</sup> Second, while the standards are binding on federal detention facilities,<sup>175</sup> and the Act stipulates the loss of 5% of federal correctional funding for states that fail to implement the standards,<sup>176</sup> there is no formal enforcement mechanism. Lastly, and alarmingly, the Department of Justice announced in 2011 that the proposed definition of “sexual abuse” does not include “consensual activity between inmates.”<sup>177</sup> Section 115.77 provides, “Any prohibition on inmate-on-inmate sexual activity shall not consider consensual activity to constitute sexual abuse.”<sup>178</sup> Although the proposed standards mandate screening for risk of victimization and abuse by considering age<sup>179</sup> and physical build,<sup>180</sup> these measures alone will be porous in identifying child prisoners who are already turned out because, as one court observed, “[b]y the time an inmate reaches his initial classification destination . . . it is difficult to discern nonconsensual homosexual activity, because the resistance of most nonconsensual victims has been broken by that time.”<sup>181</sup> Correctional officers

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170. See 42 U.S.C. § 15602 (1) (2006).

171. See *supra* notes 76-79 and accompanying text (examining the study’s findings).

172. BECK ET AL., *supra* note 65, at 6.

173. PREA Notice of Proposed Rulemaking, *supra* note 100.

174. 42 U.S.C. § 15607(a)(3).

175. *Id.* § 15607(b).

176. *Id.* § 15607(c)(2).

177. PREA Notice of Proposed Rulemaking, *supra* note 100, at 6251. There is recognition of “nonconsensual sexual acts involving pressure . . . [and] abusive sexual contacts.” *Id.* at 6268.

178. *Id.* at 6283; see also *id.* at 6251 (“The proposed definition of sexual abuse excludes consensual activity between inmates, detainees, or residents, but does not exclude consensual activity with staff.”); *id.* at 6263 (“[T]he standard provides that an agency must not consider consensual sexual contact between inmates to constitute sexual abuse. This standard is not intended to limit an agency’s ability to prohibit such activity, but only to clarify that consensual sexual activity between inmates does not fall within the ambit of PREA.”).

179. *Id.* at 6280.

180. *Id.*

181. *Anderson v. Redman*, 429 F. Supp. 1105, 1117 n.31 (D. Del. 1977); see also Christine A. Saum et al., *Sex in Prison: Exploring Myths and Realities*, 75 PRISON J. 413, 418 (1995) (concluding that “some sexual activity may appear consensual although the inmate may actually

would likely agree; Professor Eigenberg reported that 96% of surveyed correctional officers found it “sometimes difficult to tell whether inmates were being forced to participate in sexual acts or if they were willing partners in consensual sexual activities.”<sup>182</sup>

Moreover, even if a boy prisoner has reached the statutory age of consent, he belongs to a subgroup of inmates—youthful prisoners writ large—that is “physically, cognitively, socially, and emotionally . . . ill-equipped to respond to sexual advances.”<sup>183</sup> Consequently, his own deficits, in combination with his being situated in a coercive environment, rob him of the moral agency he could exercise outside of prison.<sup>184</sup>

Unless the “bad man” theory of prison rape loses ground to a more nuanced theory of prison rape, the PREA as now written could do the least for the group of inmates arguably in need of the most protection—boy prisoners.<sup>185</sup>

## V. THE TURN-OUT AMENDMENT TO THE PREA

The PREA should not be seen as a completed work. Whereas the PREA may well be “hortatory,” it can also be classified as an aspirational statute which “express[es] goals that we wish we could achieve, rather than what we can realistically achieve.”<sup>186</sup> Aspirational statutes can legitimate calls for additional reforms—such as the proposal delineated below: a new federal cause of action (1) dictating that the imprisoning authority bear strict liability for the sexual victimization of boy prisoners; (2) exempting boy prisoners using this cause of action from certain onerous provisions of the Prison Litigation Reform Act (PLRA); and (3) mandating the appointment of a guardian ad litem for each boy prisoner.

### A. A Strict Liability Cause of Action

1. *Elements.*—Given the underprotection afforded by the Eighth Amendment to boys in a man’s prison and the uncertainty as to whether the extant PREA can

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be coerced”); cf. Christopher Hensley, *Consensual Homosexual Activity in Male Prisons*, 26 CORR. COMPENDIUM NO. 1, at 1 (2001) (stating that estimates of consensual inmate sexual activity vary, ranging from 2% to 65%, and explaining that inmates underreport sexual activity, fearing they will be labeled as “weak”).

182. Eigenberg, *supra* note 101, at 425.

183. NAT’L CRIM. JUSTICE REFERENCE SERV., *supra* note 76, at 142-43.

184. See generally Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998) (delineating and critiquing state statutes that prohibit rape by coercion).

185. Since the PREA’s passage in 2003, there has been a yearly increase in the estimated number of nationwide allegations of sexual victimization (5386 in 2004; 6241 in 2005; 6528 in 2006). See BECKET AL., SEXUAL VIOLENCE REPORTED, *supra* note 50, at 2. However, it would be premature to fault the “bad man” theory given that the increase may be the result of better reporting procedures.

186. Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Deadline Dilemma in Environmental Statutes*, 80 CAL. L. REV. 1255, 1295 (1992).



remedy that underprotection, this Article recommends amending the PREA to provide for a new federal cause of action that exclusively addresses sexual abuses visited upon boy and girl prisoners detained while awaiting trial or under a sentence of confinement. This statutory cause of action would lie against the relevant correctional authority, including the Federal Bureau of Prisons, Immigration and Naturalization Service, state departments of correction, county jails, and city lock-ups. As a species of tort liability, the statute would provide for actual and punitive damages as well as injunctive relief. The actionable sexual injuries would consist of two analytical categories: (1) sexually motivated assault, i.e., sex acts involving the use of force; and (2) sexual exploitation, i.e., sexual acts committed without physical force irrespective of purported consent but against the will of the victim.<sup>187</sup> The actionable injuries would mirror the proposed PREA definitions of “sexual abuse”<sup>188</sup> and “sexual harassment,”<sup>189</sup> excepting the proposed exclusion of consensual sexual activity.<sup>190</sup>

The plaintiff would have to show by a preponderance of the evidence that the prohibited behavior occurred, but the state of mind of the defendant would be irrelevant because the statute would impose strict liability. The statute’s reach would be narrow—with the eligible plaintiffs being children under the age of eighteen who have been certified as adults and confined as such—so as not to present a broad challenge to fault-based law. As a species of tort liability, this cause of action would be informed by common law to the extent that such case law does not impede the goals of the legislation as delineated below. The victim, his or her guardian, or his or her guardian ad litem<sup>191</sup> could initiate litigation under this amendment. The federal magistrate or the U.S. district court having jurisdiction could appoint counsel for the victim and provide for his or her fair compensation.<sup>192</sup>

By imposing strict liability, the proposed cause of action represents the civil justice counterpart to state criminal statutes providing for strict liability for sex crimes against juveniles.<sup>193</sup> Both share the same objective: the protection of

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187. This nomenclature is that of Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1797-1800 (1992).

188. PREA Notice of Proposed Rulemaking, *supra* note 100, at 6282.

189. *Id.*

190. See *supra* notes 183-84 and accompanying text (critiquing the notion that boy prisoners are capable of consenting to prison sex).

191. See *infra* notes 240-43 and accompanying text (advocating the appointment of guardians ad litem).

192. Appointment in such cases would be an exception to the rule that “[e]xcept in very limited circumstances, courts routinely decline to provide court-appointed counsel in civil cases.” Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1544 (2005).

193. See Alisa Graham, Note, *Simply Sexual: The Discrepancy in Treatment Between Male and Female Sex Offenders*, 7 WHITTIER J. CHILD & FAM. ADVOC. 145, 155 (2007) (“Courts have consistently ruled that sex crimes against children are strict liability crimes and therefore consent

children from sexual exploitation by adults.<sup>194</sup>

2. *Rationale*.—The justification originally offered by Justice Marshall for the deliberate indifference standard—“the common-law view that ‘[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself’”—requires the discharge of a corresponding, extraordinary duty for boy prisoners. Discharging this duty requires an amendment to the PREA that provides for strict liability for the sexual abuse and sexual harassment of boy prisoners.

An appropriate common law analogy can be found in the seminal decision of English courts in *Rylands v. Fletcher*.<sup>196</sup> The defendant’s reservoir had burst and eventually flooded the plaintiff’s coal mine.<sup>197</sup> At trial, Judge Blackburn held that a “person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and . . . is prima facie answerable for all the damage which is the natural consequence of its escape.”<sup>198</sup> In affirming judgment for the plaintiff, the House of Lords imposed a strict liability standard for abnormally dangerous activities and conditions arising from non-natural use of land.<sup>199</sup>

Some 150 years after *Rylands*, imprisonment of boy prisoners represents an unduly hazardous use of state authority. Commentators correctly describe men’s prisons as a “world of violence,”<sup>200</sup> a “walled battlefield,”<sup>201</sup> “Hobbesian,”<sup>202</sup> and like “urban jungle warfare.”<sup>203</sup> As documented earlier, it is far worse for boy prisoners.<sup>204</sup> Fault primarily resides in the subterranean prison, where a subculture rewards men at their worst. “In prison,” wrote one noted penologist, “men . . . are explicitly and almost unanimously encouraged to be uncivil and amoral . . . .”<sup>205</sup> For the prison rapist, manhood finds affirmation in the sexual

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is not a defense.”).

194. See *id.* (“The sexual assault laws make assumptions regarding the age at which a person is old enough and mature enough to give informed consent to sexual behavior. These laws are borne out of society’s desire to protect its children from the sexual exploitation of adults.” (internal citations omitted)).

195. *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

196. [1866] 1 L.R. Exch. 265, *aff’d*, [1868] 3 L.R.E. & I. App. 330 (H.L.).

197. See *id.* at 265-67.

198. *Id.* at 279.

199. *Rylands*, 3 L.R.E. & I. App. at 330.

200. MATTHEW SILBERMAN, *A WORLD OF VIOLENCE: CORRECTIONS IN AMERICA 2* (Roy Roberg ed., 1995).

201. Robertson, *supra* note 105, at 341.

202. James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 102 (1986).

203. See, e.g., TOCH, *supra* note 9, at 330.

204. See *supra* notes 49-82 and accompanying text (examining the prevalence of sexual abuse).

205. ROBERT JOHNSON, *HARD TIME: UNDERSTANDING AND REFORMING THE PRISON* 99 (Todd Clear ed., 3d ed. 2002).



domination of another.<sup>206</sup> For his victim, manhood gives way to the socially constructed “pussy” and “bitch.”<sup>207</sup>

Moreover, like the non-natural land use present in *Rylands*, imprisonment represents an anomalous exercise of state power; it deprives boy prisoners of both liberty and safety.<sup>208</sup> While the loss of considerable liberty invariably accompanies incarceration, surely prison rape falls outside the sentence imposed by statute. “[H]aving stripped . . . [inmates] of virtually every means of self-protection and foreclosed their access to outside aid,” wrote the Supreme Court in *Farmer v. Brennan*, “the government and its officials are not free to let the state of nature take its course.”<sup>209</sup>

### 3. Objectives.—

a. *Maximum deterrence.*—Deborah Golden observed that “[r]ape disrupts the sense of autonomy, control, and mastery over one’s body. The body’s boundaries are violated, orifices are penetrated, aversive sensory stimuli cannot be escaped, and motor and verbal functions are controlled by the assailant.”<sup>210</sup> Being turned out, and thus having one’s gender socially reconstructed, represents an especially profound deprivation of autonomy. Hence, protecting boys in a man’s prison merits a statutory response designed for maximum deterrence. In such instances, strict liability becomes both necessary and proper:

Maximum deterrence would be achieved not by the fault-based regime of qualified immunity but by holding governments strictly liable for all injuries caused by unconstitutional behavior. Strict liability would force government to internalize the costs of constitutional violations, including those not avoided by cost-justified precautions in hiring, training, supervision, and the like. Requiring government to bear the full costs of such actions would not only induce it to take such precautions, it would also depress activity levels for conduct that is likely to involve constitutional error despite reasonable care.<sup>211</sup>

Strict liability becomes all the more important when hazardous activities, such as imprisoning boys, operate under a cost avoidance scheme. Regrettably,

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206. See *supra* note 109 and accompanying text (discussing the subcultural equation of masculinity with domination).

207. See *supra* notes 107-10 and accompanying text (describing the feminization of the rape victim in prison).

208. Cf., e.g., *Bill v. Super. Ct. of S.F.*, 137 Cal. App. 3d 1002, 1008 (Cal. Ct. App. 1982) (“[T]he first obligation of government is to maintain the peace and enforce the law . . .”).

209. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

210. Deborah M. Golden, *It’s Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN’S L.J. 37, 53 (2004) (citation omitted).

211. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 265-66 (2000) (internal citations omitted); see also Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 352 (1996) (“This . . . aims at imposing liability in a way that reduces the number and severity of accidents.” (internal citations omitted)).

Congress legislatively imposed a form of cost avoidance upon the PREA standards. The Act provides in relevant part that “[t]he Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.”<sup>212</sup> The proposed strict liability cause of action would incentivize correctional authorities to institute additional protective measures even if they imposed substantial costs.<sup>213</sup>

The proposed amendment would also advance deterrence through cost internalization. Whereas the damages arising from sexual misconduct are presently channeled by the current fault-based deliberate indifference standard onto the supposed “bad men” (the front-line officers who failed to protect the boy prisoner from sexual assault), strict liability would redirect them to the prison as an instrument of public policy.

*b. Fairness.*—A strict liability statute would also advance the goal of fairness. As explained by George Fletcher, “a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim . . . in short, for injuries resulting from nonreciprocal risks.”<sup>214</sup> As we have seen, the “turning-out” of boy prisoners arises because of a hypermasculine prison subculture as well as prison officers’ indifference to their victimization, which are risks not formally part of their sentence or ones prisoners have created.<sup>215</sup> These risk are thus nonreciprocal, and fairness dictates recovery of damages. To bar recovery in the absence of fault by prison officers would effectively subject turned-out boys to the doctrine of assumption of risk.

### B. PLRA Exemptions

Congress passed the Prison Litigation Reform Act to deter “recreational” litigation by inmates<sup>216</sup> and to limit the extent and duration of injunctive relief.<sup>217</sup>

212. 42 U.S.C. § 15607(a)(3) (2006).

213. However, provisions must be made to minimize the use of solitary confinement as a protective measure, given the harm it can inflict. See Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 354 (2006) (“The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning . . .”).

214. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972). However, a strict liability provision could place deterrence and individual autonomy at cross-purposes. Namely, extreme security measures such as solitary confinement could diminish autonomy by impairing the boy prisoners’ already limited liberty interests. Thus, a strict liability proviso in the PREA should be accompanied by language that directs prison authorities to house them in the least restrictive manner that is compatible with their safety.

215. See *supra* notes 83-116 and accompanying text (examining the social construction of boys as punks).

216. See, e.g., *Mitchell v. Farcass*, 112 F.3d 1483, 1488 (11th Cir. 1997) (“Congress promulgated the Act to curtail abusive prisoner . . . litigation.”); *United States v. Simmonds*, 111 F.3d 737, 743 (10th Cir. 1997) (“The main purpose of the Prison Litigation Reform Act was to curtail abusive prison-condition litigation.”), *overruled by* *United States v. Hurst*, 322 F.3d 1256



While the PLRA applies to boys imprisoned in juvenile and adult institutions,<sup>218</sup> the Congressional Record gives no indication that boy prisoners contributed to the evils that the legislation intended to remedy. On the other hand, as explained below, absent statutory exemptions, two provisions of the Act would undermine the objectives of the proposed cause of action.

1. *Exhaustion Requirement.*—The Supreme Court in *Porter v. Nussle*<sup>219</sup> held that exhaustion is statutorily mandated under 42 U.S.C. § 1997e(a),<sup>220</sup> which provides: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”<sup>221</sup> The proposed PREA standards permit persons other than the victim to file a grievance on his behalf,<sup>222</sup> but they also allow the victim to withdraw the complaint.<sup>223</sup> If he does not withdraw it, he could be “personally” required to exhaust the grievance process.<sup>224</sup>

The Prison Rape Commission unsuccessfully advocated exempting all prison rape victims “[b]ecause of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult—if not impossible—to meet the short timetables of administrative procedures.”<sup>225</sup> For punks, the grievance process imposes an even

(10th Cir. 2003); *Hampton v. Hobbs*, 106 F.3d 1281, 1286 (6th Cir. 1997) (“The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts.”); *Santana v. United States*, 98 F.3d 752, 755 (3d Cir. 1996) (“Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act, most of which concern prison conditions and many of which are routinely dismissed as legally frivolous.”); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging legislation to “bring relief to a civil justice system overburdened by frivolous prisoner lawsuits”).

217. See *Kincade v. Sparkman*, 117 F.3d 949, 951 (6th Cir. 1997) (“The text of the Prison Litigation Reform Act itself reflects that the drafters’ primary objective was to curb prison condition litigation.”); 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (“[N]o longer will prison administration be turned over to [f]ederal judges for the indefinite future for the slightest reason.”).

218. 18 U.S.C. § 3626(g)(5) (2006) (providing that the PLRA applies to persons confined in “prison,” a term that embraces juvenile facilities).

219. 534 U.S. 516 (2002).

220. *Id.* at 524.

221. 42 U.S.C. § 1997e(a).

222. PREA Notice of Proposed Rulemaking, *supra* note 100, § 115.52(c)(1).

223. *Id.* § 115.52(c)(2).

224. *Id.* § 115.52(c)(3).

225. Letter from the Nat’l Prison Rape Elimination Comm’n to Hon. Bobby Scott and Hon. Randy Forbes, Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary (Jan. 24, 2008), available at [http://www.savecoalition.org/pdfs/PREA\\_letter\\_urging\\_reform\\_PLRA.pdf](http://www.savecoalition.org/pdfs/PREA_letter_urging_reform_PLRA.pdf); see also Golden, *supra* note 210, at 39 (“[F]or the sake of clarity and good

greater cost. First, it comprises a status degradation ceremony by requiring the victim to publicly “come out” as a rape victim and punk, thus subjecting him to shame and ridicule for being less than a “real” man. Also, the intellectual development of boy prisoners, as well as their limited schooling, poorly equips them to navigate successfully through the labyrinth of grievance procedures.<sup>226</sup>

2. *Physical Injury Requirement*.—The PLRA provides under 42 U.S.C. § 1997e(e) that “[n]o [f]ederal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>227</sup> The Act fails to define “physical injury,” but some courts hold that it must be more than de minimis but not necessarily significant.<sup>228</sup> Lower federal courts have long been in agreement that § 1997e(e) bars only compensatory damages, leaving nominal damages, punitive damages, and equitable relief on the table.<sup>229</sup>

While several courts have concluded that rape is more than de minimis<sup>230</sup> and that common sense dictates that a rape qualifies as physical injury,<sup>231</sup> other forms of sexual abuse may not pass muster under § 1997e(e) and will therefore not be compensable. For instance, in *Smith v. Shady*,<sup>232</sup> the “[p]laintiff’s allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand . . . [did] not constitute a physical injury or mental symptoms.”<sup>233</sup> The court reasoned that the defendant inflicted at worst a de minimis injury rather than the

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public policy, the PLRA should be amended to state that a rape in the custodial setting is compensable. Victims of rape should not be forced to navigate through unnecessary procedural hurdles and endless court motions to receive compensation for their injuries.” (citation omitted)).

226. See *supra* note 99 and accompanying text (delineating the several impairments of boy prisoners).

227. 42 U.S.C. § 1997e(e) (2006). Lower federal courts are divided over the meaning of § 1997e(e). The most common interpretation “focuses on the type of relief sought. Thus, requesting relief for a ‘mental or emotional injury’—regardless of the underlying constitutional or statutory right in question—requires the showing of a concurrent physical injury.” James E. Robertson, “Let’s Get Physical”: *Section 1997e(e) of the Prison Litigation Reform Act*, 22 CORR. L. REP. 7, 9 (2010) (internal citations omitted).

228. *E.g.*, *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

229. See, *e.g.*, *Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (permitting nominal and punitive damages); *Waters v. Andrews*, No. 97-CV-407A(F), 2000 U.S. Dist. LEXIS 16004, at \*23 (W.D.N.Y. Sept. 15, 2000) (permitting nominal and punitive damages); *McGrath v. Johnson*, 67 F. Supp. 2d 499, 508 (E.D. Pa. 1999) (permitting nominal damages). But see *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (“[Section] 1997e(e) draws no such distinction [between compensatory and punitive damage claims]. It simply prevents suits ‘for’ mental injury without prior physical injury.”).

230. *E.g.*, *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002).

231. See *id.* at 627; see also *Liner*, 196 F.3d at 135 (“[T]he alleged sexual assaults qualify as physical injuries as a matter of common sense.” (emphasis added)).

232. No. 3:CV-05-2663, 2006 WL 314514, at \*1 (M.D. Pa. Feb. 9, 2006).

233. *Id.* at \*2.



type of actionable injury envisaged by Congress.<sup>234</sup>

Section 1997e(e) makes recovery for sexual harassment problematic.<sup>235</sup> Sexual harassment in prison can involve kissing, touching, or fondling as well as verbal remarks intended to feminize the future target, proposition him, or extort him.<sup>236</sup> The Department of Justice's proposed PREA standards correctly recognize that sexual harassment can be a precursor to sexual assault.<sup>237</sup> However, courts have invoked the PLRA in denying recovery for harassing behavior, even if it included some physical contact, finding the behavior "not sufficiently serious"<sup>238</sup> or not "literally shocking to the conscience."<sup>239</sup>

### C. *Guardians Ad Litem*

Two distinguished commentators on prisoners' rights warn that "[e]xclusive reliance on the courts [to protect prisoners] . . . is misplaced: judges can only remedy problems once a constitutional violation is found; they are not in a position to prevent problems in the first place. The far wiser approach is to develop preventive oversight mechanisms . . . ."<sup>240</sup> Oversight is especially important for boy prisoners. As Human Rights Watch observed, "[t]he history of prison rape is a history of officials who denied the problem existed, tolerated it, or thought nothing could be done to stop it."<sup>241</sup>

This Article's proposed "turn-out" amendment would require the appointment of a guardian ad litem for every boy prisoner. To ensure his or her independence, the trial judge would appoint the guardian ad litem at sentencing. Ideally, many guardians ad litem could be drawn from civilian organizations with a history of

234. *See id.*

235. *Cf.* Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 59-60 (1999) ("Common examples of claims that may be barred by § 1997e(e) include compensatory damages claims for government racial discrimination, sexual harassment, interference with religious freedoms, and infliction of psychological torture.").

236. *See* Robertson, *supra* note 100, at 7 n.21 (discussing the nature of sexual harassment in prison).

237. PREA Notice of Proposed Rulemaking, *supra* note 100, at 6251.

238. *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997). A female correctional officer made "'a pass' at him" and later "squeezed his hand, touched his penis and said, '[Y]ou know your [sic] sexy black devil, I like you;'" on another occasion, she bumped into him "with her whole body[,] vagina against penis," but this contact was deemed "not sufficiently serious." *Id.* at 859-62.

239. *See* Gilson v. Cox, 711 F. Supp. 354, 355-56 (E.D. Mich. 1989) (ruling that allegations that female correctional officer "made various sexual advances toward him and physically abused him by grabbing his genitals and buttocks," if true, were not "literally shocking to the conscience").

240. Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1384 (2010).

241. Press Release, Human Rights Watch, US: Prevent Prison Rape (June 23, 2009) (quoting Jamie Fellner, Senior Counsel for the U.S. Program of Human Rights Watch), *available at* <http://www.hrw.org/en/news/2009/06/23/us-prevent-prison-rape>.

prison oversight, such as the Correctional Organization of New York.<sup>242</sup>

The guardian ad litem would be charged with monitoring the boy's welfare and, if merited, could initiate and represent his interests in grievance procedures and litigation. He or she would be empowered to visit regularly and unannounced. All communication between the boy prisoner and his guardian ad litem would be confidential. The guardian ad litem would have access to all reports addressing the boy or his cellmates and would have to receive notice of pending classification decisions, disciplinary hearings, or grievances to which the boy prisoner would be a party or witness. Additional provisions regarding the selection, training, expenses, and powers of the guardian ad litem could draw upon the practice of appointing guardians ad litem for juvenile victims in criminal proceedings.<sup>243</sup>

### CONCLUSION

"Until we begin to make it wrong to condone rape in a prison context—or to dismiss it as inevitable—we will continue to allow staggering numbers of individuals to be victims and to remain voiceless in the face of continued victimization."<sup>244</sup> Statutory or constitutional responses to prison rape will likely have limited effectiveness unless they can impair the prison subculture's capacity to construct and transmit a coherent rationale for same-sex sexual abuse. The transmission of that rationale, which equates weakness with femininity, and femininity with inferiority, could be interrupted by a dissonant norm—one that prizes a civil, empathetic masculinity. Israeli prisons provide some guidance in this regard. Rates of sexual abuse are thought to be exceedingly low in Israel's prisons, but not because of educational programs or beefed-up security. Rather, for various reasons, a dissonant set of norms lead "Israeli inmates [to] see coerced same-sex sexual relations and other betrayals of the prisoners' code as a perverse symbol of their own abuse by society."<sup>245</sup> In the United States, there may be no more perverse symbol of societal abuse of inmates than the turning-out of boy prisoners and no stronger a deterrent than the shaming of inmates who prey on them. Indeed, when an adult-age inmate sees in the glint of a boy prisoner's eyes

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242. See generally Jack Beck, *Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring*, 30 PACE L. REV. 1572 (2010); John M. Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members—the New York Experience*, 30 PACE L. REV. 1562 (2010).

243. See, e.g., David Finkelhor et al., *How the Justice System Responds to Juvenile Victims: A Comprehensive Model*, JUV. JUST. BULL., Dec. 2005, at 5, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/210951.pdf> (noting that "about 18 percent of child victims received such representation").

244. Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 176 (2009).

245. Tomer Einat, *Inmate Harassment and Rape: An Exploratory Study of Seven Maximum- and Medium-Security Male Prisons in Israel*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 648, 660 (2009).



a reflection of himself, he will no longer accept the subcultural rationale for the turning-out of boy prisoners.

To constrain the emasculating features of the contemporary prison that drive the social construction of punks,<sup>246</sup> I see no alternative to "normalizing" prison life<sup>247</sup> so as to render it as much like the broader society as security concerns permit.<sup>248</sup> Until then, states must be deterred from imprisoning boys absent a compelling, individualized justification. Deterrence of this sort requires strict liability for their victimization. In the meantime, men outside of prison ought to lead by example.

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246. See Robertson, *supra* note 100, at 12 ("An inmate confined in California's Soledad Prison observed, 'Not only is the State of California going to take away your freedom, but also your manhood . . . .' Imprisonment represents more than the loss of freedom; it also diminishes you as an adult male. As one commentator wrote, '[T]he prisoner's masculinity is in fact besieged from every side.'" (internal citations omitted)).

247. See Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 FED. PROBATION 46, 51 (1984) ("'Normalization' means that the same norms that check homosexual activity in free communities should check homosexual activity in prisons . . . . A male inmate is not to be accepted as a female surrogate in any sense for to do this is to invite problems associated with sexual aggression.").

248. As indicated below, the "normalization of prison life" via coed imprisonment may primarily benefit boys:

In the situation of women incarcerated in a mixed closed prison with young men at Ringe in Denmark, we have a striking example of the instrumentalisation of women, their explicit dedication to the normalisation of the boys' lives. While economic rationality could be seen as a factor (the "low numbers" again), still, the officially stated objective is "normalisation" in the Danish penal and correctional system. In the case of Ringe, it means normalising the lives of young heterosexual men inmates.

Marie-Andrée Bertrand, *Incarceration as a Gendering Strategy*, 14 CAN. J.L. & SOC'Y 45, 58 (1999).

# THE CHANGING SUPREME COURT AND PRISONERS' RIGHTS

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## INTRODUCTION

The final years of the Rehnquist Court era represented a period of extraordinary<sup>1</sup> compositional stability<sup>2</sup> on the U.S. Supreme Court as the same nine Justices<sup>3</sup> served together for the period from 1994 to 2005.<sup>4</sup> Beginning in 2005, the Court's composition changed significantly over a relatively short period of time with the departures of Chief Justice William Rehnquist,<sup>5</sup> Justice Sandra Day O'Connor,<sup>6</sup> Justice David Souter,<sup>7</sup> and Justice John Paul Stevens<sup>8</sup> and their

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1. See MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 67 (2005) ("You have to go back to the years from 1811 to 1823 to find a longer period with no changes in personnel on the [Supreme] Court (and then there were only seven justices anyway).").

2. See, e.g., JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 5 (2007) ("The Court . . . had functioned as a unit for more than a decade, unaltered since the seating of Justice Breyer in 1994 . . .").

3. The nine Justices were Chief Justice William Rehnquist, Justice John Paul Stevens, Justice Sandra Day O'Connor, Justice Antonin Scalia, Justice Anthony Kennedy, Justice David Souter, Justice Clarence Thomas, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. See Christopher E. Smith & Thomas R. Hensley, *Decision-Making Trends of the Rehnquist Court Era: Civil Rights and Liberties Cases*, 89 JUDICATURE 161, 165 (2005).

4. The period of stability lasted from the confirmation of Justice Stephen Breyer to replace retiring Justice Harry Blackmun in 1994 until the next departure from the Court, that of Chief Justice William Rehnquist in 2005, who was replaced by Chief Justice John Roberts. See David Margolick, *Scholarly Consensus Builder: Stephen Gerald Breyer*, N.Y. TIMES, May 14, 1994, available at <http://www.nytimes.com/1994/05/14/us/man-supreme-court-scholarly-consensus-builder-stephen-gerald-breyer.html>; David E. Rosenbaum, *An Advocate for the Right*, N.Y. TIMES, July 28, 2005, at A16.

5. Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES, Sept. 4, 2005, available at <http://www.nytimes.com/2005/09/04/politics/04court.html>.

6. Linda Greenhouse, *With O'Connor Retirement and a New Chief Justice Comes an Awareness of Change*, N.Y. TIMES, Jan. 28, 2006, available at <http://www.nytimes.com/2006/01/28/politics/politicsspecial1/28memo.html>.

7. Kate Phillips, *Souter and Justices Exchange Farewells*, THE CAUCUS (June 29, 2009, 2:11 PM), <http://thecaucus.blogs.nytimes.com/2009/06/29/Souter-and-justices-exchange-farewells/>.

8. Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement Is Political Test for Obama*, N.Y. TIMES, Apr. 9, 2010, available at <http://www.nytimes.com/2010/04/10/us/politics/10stevens.html>.



attendant replacements by, respectively, Chief Justice John Roberts (2005),<sup>9</sup> Justice Samuel Alito (2006),<sup>10</sup> Justice Sonia Sotomayor (2009),<sup>11</sup> and Justice Elena Kagan (2010).<sup>12</sup> Such changes in the Court's composition inevitably affect its decisionmaking.<sup>13</sup> This seems particularly true for the recent changes that commentators claim "transformed"<sup>14</sup> the Court and constituted "one of the most fateful shifts in the country's judicial landscape."<sup>15</sup> In addition, there are other key factors that affect trends in Supreme Court decisionmaking,<sup>16</sup> most notably the treatment of precedent by particular Justices on the Court at any given moment.<sup>17</sup> This Article will discuss the potential impact of those changes on one particular area of law: prisoners' rights. The recent changes in the Court's composition raise questions about the preservation and enforcement of legal protections for individuals held in jails and prisons.

### I. REHNQUIST COURT JUSTICES

In discussing the impact of changes in the Supreme Court's composition, this Article will use the usual definitions employed by judicial scholars for categorizing Justices' votes and case outcomes as "liberal" and "conservative."<sup>18</sup>

9. Sheryl Gay Stolberg & Elisabeth Bumiller, *Senate Confirms Roberts as 17th Chief Justice*, N.Y. TIMES, Sept. 30, 2005, available at <http://www.nytimes.com/2005/09/30/politics/politicsspecial1/30confirm.html>.

10. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, available at <http://www.nytimes.com/2006/02/01/politics/politicsspecial1/01confirm.html>.

11. Charlie Savage, *Sotomayor Sworn In as New Justice*, THE CAUCUS (Aug. 8, 2009, 12:49 PM), <http://thecaucus.blogs.nytimes.com/2009/08/08/sotomayor-sworn-in-as-new-justice/>.

12. Peter Baker, *Kagan Is Sworn In as Fourth Woman, and 112th Justice, on the Supreme Court*, N.Y. TIMES, Aug. 7, 2010, available at <http://www.nytimes.com/2010/08/08/us/08kagan.html>.

13. See LAWRENCE BAUM, *THE SUPREME COURT* 27 (4th ed. 1992) ("The policies that any government body makes are determined in part by the attitudes and perspectives of the people who serve in it. This is particularly true of the Supreme Court . . . . Indeed, the single most important factor shaping the Court's policies at any given moment may be the identity of its members.").

14. GREENBURG, *supra* note 2, at 5.

15. *Id.*

16. See BAUM, *supra* note 13, at 130 ("The factors that affect decisions of the Supreme Court can be placed in four general categories: (1) the state of the body of law that is applicable to a case; (2) the environment of the Court, including other policy makers, interest groups, and public opinion; (3) the personal values of the [J]ustices concerning the desirability of alternative decisions and policies; and (4) interaction among members of the Court.").

17. *Id.* at 130, 132.

18. The terms "liberal" and "conservative" in this Article characterize Supreme Court decisions in the manner used in the Supreme Court Judicial Database, in which "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American] . . . and anti-government in due process and

In essence, liberal votes and decisions are those that support claims of rights by prisoners, and conservative votes and decisions are those that endorse the authority of corrections officials.<sup>19</sup> These labels and classifications can be problematic for specific rights issues, such as gun owners' rights and property rights, in which politically conservative jurists favor individuals' claims and politically liberal jurists support assertions of state authority.<sup>20</sup> In the case of prisoners' rights, however, these labels and classifications seem more closely aligned with Justices' typical voting patterns in constitutional rights cases, as indicated in Table 1 for those Justices who served during the stable composition period (1994-2005) of the later Rehnquist Court era.<sup>21</sup> The ordering of the Justices from most conservative to most liberal according to their voting records for prisoners' rights cases aligns closely with their ranking for voting in a broader array of criminal justice cases<sup>22</sup> and in constitutional rights cases generally.<sup>23</sup> As the following section will discuss, the departures and replacements of specific Justices, especially the two most liberal Justices in prisoners' rights cases, Justices Stevens and Souter,<sup>24</sup> raise questions about future Supreme Court decisionmaking in such cases during the Roberts Court era.

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privacy.” Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989).

19. *Id.* (“Liberal decisions in the area of civil liberties are pro-person accused or convicted of crime [i.e., convicted offenders in prisons and jails].” (emphasis added)). Therefore, “[b]y contrast, conservative decisions favor the government[, including government officials who run prisons and jails,] in civil rights and liberties cases.” Smith & Hensley, *supra* note 3, at 162.

20. *See, e.g.*, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (where consistently conservative Justices Scalia, Roberts, Thomas, and Alito supported individual gun rights claims against a local law restricting handgun ownership and possession); *Kelo v. City of New London*, 545 U.S. 469 (2005) (where consistently liberal Justices Stevens, Souter, Ginsburg, and Breyer supported the city's eminent domain authority against property rights claim of an individual homeowner).

21. Data are drawn from Christopher E. Smith & Anne M. Corbin, *The Rehnquist Court and Corrections Law: An Empirical Assessment*, 21 CRIM. JUST. STUD. 179, 186 tbl.5 (2008).

22. *See* Christopher E. Smith et al., *Criminal Justice and the 2003-2004 United States Supreme Court Term*, 35 N.M. L. REV. 123, 130-32 (2005).

23. Smith & Hensley, *supra* note 3, at 164 tbl.3.

24. *See infra* Table 1.



**Table 1.** Individual Justices’ Liberal-Conservative Voting Percentages in Constitutional Corrections Law Cases, 1986 Term Through 2004 Term.<sup>25</sup>

Justice	Conservative Voting Percentage	Liberal Voting Percentage
Clarence Thomas	88% (23)	12% (3)
Antonin Scalia	87% (33)	13% (5)
William Rehnquist	78% (29)	22% (8)
Sandra Day O’Connor	71% (27)	29% (11)
Anthony Kennedy	69% (22)	31% (10)
Stephen Breyer	43% (10)	57% (13)
Ruth Bader Ginsburg	42% (10)	58% (14)
David Souter	39% (11)	61% (17)
John Paul Stevens	16% (6)	84% (32)

A. Key Departures

A key aspect of composition change from the Rehnquist Court era to the Roberts Court era is the identity and role of each Justice who left the Court. By considering their roles in prisoners’ rights cases, one can ponder the potential impact of their replacements and the overall prospects for the future of prisoners’ rights cases in the Supreme Court.

1. *John Paul Stevens*.—Justice Stevens demonstrated an extraordinary record of support for identifying and protecting rights for prisoners during his thirty-five-year career on the Supreme Court.<sup>26</sup> As a Republican appointee of President Gerald Ford in 1975,<sup>27</sup> Justice Stevens arrived at the Court amid expectations that he would be moderately conservative.<sup>28</sup> He immediately demonstrated his liberal orientation toward prisoners’ rights when, in a case argued just four months after he began his service as an Associate Justice, Stevens dissented against a decision that denied a right to pre-transfer hearings for prisoners being sent to institutions with less favorable living conditions.<sup>29</sup> On behalf of himself and the two holdover liberals from the Warren Court era, Justices William Brennan<sup>30</sup> and Thurgood Marshall,<sup>31</sup> Justice Stevens articulated a strong endorsement of rights

25. Data are drawn from Smith & Corbin, *supra* note 21, at 186 tbl.5.

26. See Christopher E. Smith, *The Roles of John Paul Stevens in Criminal Justice Cases*, 39 SUFFOLK U. L. REV. 719, 733-36 (2006).

27. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 322-24 (2d ed. 1985).

28. *Id.* at 324 (“Stevens was considered difficult to categorize, but ‘centrist’ was the label most often attributed to him; he was professionally perceived as a ‘legal conservative.’”).

29. *Meachum v. Fano*, 427 U.S. 215, 229-35 (1976) (Stevens, J., dissenting).

30. See ABRAHAM, *supra* note 27, at 264 (“Justice Brennan . . . champion[ed] a generously expansive interpretation of the Bill of Rights and the Civil War amendments.”).

31. *Id.* at 290 (“Marshall and Brennan thus rendered themselves into *the* two most reliable, indeed, certain unified libertarian activists on the high bench. They voted together to the tune of ninety-seven percent in almost all cases involving claims of infractions of civil rights and liberties in general and of allegations of denials of the equal protection of the laws in race and gender cases

that endure during incarceration, even for those convicted of heinous crimes:

For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.<sup>32</sup>

Justice Stevens continued to support prisoners' claims such that in his initial years of service during the Burger Court era, he earned the following observation from one scholar: "In no other area of criminal justice did Stevens differentiate himself as much from the Burger Court majority as in prisoners' rights cases. He supported the prisoner in 16 of the 17 cases considered."<sup>33</sup>

An important factor underlying his level of support for prisoners' claims was a fact that was little known until his final years of service on the Supreme Court. During his years as an attorney in Chicago, Stevens actively participated in the prisoner assistance committee of the Chicago Bar Association by undertaking pro bono representation of incarcerated offenders.<sup>34</sup> In a speech to the Chicago Bar Association, Justice Stevens explicitly acknowledged that his pro bono experience had shaped his perceptions of prisoners' claims:

In closing, I want to express my thanks to the Chicago Bar Association for the many lessons about the law that I learned during my active membership in the Association. Association assignments taught me that prisoners are human beings and some, though not all, of their claims have merit . . . that the intangible benefits of pro bono work can be even more rewarding than a paying client.<sup>35</sup>

Related to the actual experience of representing convicted offenders in court, Justice Stevens may be one of the few Justices to actually visit prisons and see firsthand the conditions under which convicted offenders live.<sup>36</sup> As an attorney,

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in particular." (internal citation omitted)).

32. *Meachum*, 427 U.S. at 233 (Stevens, J., dissenting).

33. Bradley C. Canon, *Justice John Paul Stevens: The Lone Ranger in a Black Robe*, in *THE BURGER COURT: POLITICAL AND JUDICIAL PROFILES* 343, 370-71 (Charles M. Lamb & Stephen C. Halpern eds., 1991).

34. See Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 *TEMP. POL. & CIV. RTS. L. REV.* 83, 98-100 (2007).

35. Justice John Paul Stevens, Address at the Chicago Bar Association's 125th Anniversary Dinner and Celebration (Sept. 16, 1998) (on file with author).

36. In looking at the background experiences of Justices on the Rehnquist Court and the Roberts Court, there is no public information indicating that any of them, other than Stevens, ever represented a criminal defendant or convicted offender; thus, they would not have had a reason to visit a correctional institution in order to speak with a client. The non-judicial occupations of the Justices include the following: former prosecutors (Sonia Sotomayor and Samuel Alito); former law professors (Antonin Scalia, Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, and Elena Kagan); former attorneys with high positions in the federal government or Congress in



Justice Stevens visited prisons in order to provide advice and prepare case presentations for his convicted offender-clients.<sup>37</sup> He also visited prisons as a federal appellate judge with other judges interested in the issue of prison reform.<sup>38</sup> When asked in an interview if he knew whether other Supreme Court Justices had actually visited correctional institutions, he said that he believed Justice Ruth Bader Ginsburg had visited jails or prisons, but he was unaware of whether other Justices had made such visits.<sup>39</sup> Other than Justice Clarence Thomas, who may have visited an incarcerated nephew,<sup>40</sup> there is no evidence to indicate that other Justices have firsthand exposure to correctional institutions.

Firsthand exposure to prisons is potentially significant for jurists such as Justice Stevens, whose decisionmaking includes an empathetic component<sup>41</sup>—namely, a consideration of context and consequences.<sup>42</sup> Thus, Justice Stevens has been described as a jurist “who eschews theory in favor of practical reason” and who “deliberately make[s] decisions that would create the most reasonable results on the facts as he understood them”<sup>43</sup> as he advances his “love of fairness in each individual case.”<sup>44</sup> By contrast, jurists who seek to

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Washington, D.C. (John Roberts, William Rehnquist, Antonin Scalia, Stephen Breyer, Clarence Thomas, and Elena Kagan); former state attorney general (David Souter); and former state legislator (Sandra Day O'Connor). See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited May 26, 2011); see also *Rehnquist Court (1994-2005)*, OYEZ PROJECT, <http://www.oyez.org/courts/rehnquist/rehn6> (last visited May 26, 2011).

37. Interview with Justice John Paul Stevens, U.S. Supreme Court, in Washington, D.C. (July 29, 2010).

38. *Id.*

39. *Id.*

40. Thomas's nephew, Mark Martin, is serving a thirty-year sentence in federal prison for selling cocaine. KEVIN MERIDA & MICHAEL FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* 39-40 (2007). Thomas and his wife became legal guardians to Mark Martin's son and are raising him in their Virginia home. *Id.* at 40. In the aftermath of Martin's arrest that led to his long-term incarceration, Thomas was described by his family as “keeping his distance” and not wanting to be involved, yet he also kept his imprisoned nephew informed of the son's progress in school by sending letters and report cards, so it is not clear from published reports about the extent to which Thomas visits his nephew in prison. *Id.*

41. See Christopher E. Smith, *An Empathetic Approach to Criminal Justice*, SCOTUSBLOG (May 12, 2010, 2:03 PM), <http://www.scotusblog.com/2010/05/an-empathetic-approach-to-criminal-justice> (regarding Justice Stevens's retirement).

42. According to one analyst, Justice Stevens prefers to establish standards instead of doctrinal rules in order to guide judges in a case-by-case evaluation of situations based on his “general desire to avoid wrong decisions, and to get each case as right as he can.” Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 557 (1996).

43. Ward Farnsworth, *Realism, Pragmatism, and John Paul Stevens*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 157, 178 (Earl M. Maltz ed., 2003).

44. *Id.* at 179.

create rigid rules through the application of a particular theory of interpretation, while claiming to be unconcerned about the context of cases or the consequences of their decisions, may more readily make decisions affecting prisoners' rights without any actual knowledge about the realities of prison life.<sup>45</sup>

Central to Justice Stevens's decisionmaking is what one scholar described as a belief that "the Court should protect *individual dignity* . . . [through] creative application of constitutional principles, such as due process."<sup>46</sup> Justice Stevens drew from this emphasis to serve as the Court's most outspoken and consistent advocate of consideration for the recognition of constitutional rights for convicted offenders and pretrial detainees.<sup>47</sup> He criticized the Court's deferential posture toward asserted security concerns of corrections officials that are used to curtail protections against unnecessarily intrusive searches,<sup>48</sup> limit access to family photos and reading materials,<sup>49</sup> and make it difficult for injured prisoners to prove that officials used excessive force against them.<sup>50</sup> Although he spent most of his career protesting against the Court's limited view of Eighth Amendment protections<sup>51</sup> and its failure to recognize prisoners' retention of due process liberty interests<sup>52</sup> and rights under the First<sup>53</sup> and Fourth Amendments,<sup>54</sup> Justice Stevens

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45. Justice Thomas aspires to interpret the Constitution consistently according to the original intent of the Framers. Christopher E. Smith, *Bent on Original Intent*, 82 A.B.A. J. 48, 48 (1996). This aspiration leads him to argue that the Constitution grants virtually no rights to prisoners other than a due process right of access to the courts that is limited to the existence of a mail slot in the prison into which prisoners can place petitions to be mailed to a courthouse. See Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 24 (1997). His viewpoint remains unwavering and unconcerned with practical consequences, even as it would deny constitutional protection to prisoners who are assaulted by corrections officers as in *Hudson v. McMillian*, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting), or chained to a post in the prison yard on a hot day without adequate access to water or toilet facilities, as in *Hope v. Pelzer*, 536 U.S. 730, 758 (2002) (Thomas, J., dissenting).

46. William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1090 (emphasis added).

47. See Smith, *supra* note 26, at 733-36.

48. *Bell v. Wolfish*, 441 U.S. 520, 580-81 (1979) (Stevens, J., dissenting).

49. *Beard v. Banks*, 548 U.S. 521, 545-47 (2006) (Stevens, J., dissenting).

50. *Hudson*, 503 U.S. at 12-13 (Stevens, J., concurring).

51. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 115-16 (1976) (Stevens, J., dissenting) (complaining that the Court's subjective "deliberate indifference" test would provide inadequate protection for prisoners' Eighth Amendment right to medical care).

52. See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 481 (1983) (Stevens, J., dissenting) (arguing for greater recognition of a due process liberty interest that should trigger procedural rights prior to disciplinary transfers to administrative segregation).

53. See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401, 421-25 (1989) (Stevens, J., concurring in part and dissenting in part) (advocating greater recognition of prisoners' rights to receive publications).

54. See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 542-43 (1984) (Stevens, J., concurring in part and dissenting in part) (disagreeing with the majority's rejection of any Fourth Amendment privacy



had a few opportunities to write majority opinions that condemned inhumane prison conditions<sup>55</sup> and treatment of prisoners.<sup>56</sup> In the aftermath of his retirement, it remains to be seen whether any other Roberts Court Justices will assume Justice Stevens's role as the outspoken advocate for consideration of prisoners' rights.

2. *David Souter*.—Justice Souter was appointed to the Supreme Court by Republican President George H.W. Bush because of an expectation that he would support conservative case outcomes.<sup>57</sup> During his first term on the Court from 1990 to 1991, "Souter provided a quiet, dependable vote for the Court's increasingly strong conservative majority."<sup>58</sup> Justice Souter's initial performance included his decisive fifth vote in *Wilson v. Seiter*<sup>59</sup> to extend the difficult-to-prove, subjective "deliberate indifference" standard to all Eighth Amendment conditions-of-confinement prison lawsuits.<sup>60</sup> As noted by scholars, "[i]n subsequent terms, however, [Justice Souter] . . . established an increasingly liberal voting record,"<sup>61</sup> as indicated by Table 1 data concerning his relatively liberal voting record in prisoner cases.<sup>62</sup>

Although he was actively engaged as an opinion author in the Court's debates about procedures for habeas corpus petitions,<sup>63</sup> Justice Souter rarely wrote opinions on prisoners' constitutional rights cases. He wrote for a unanimous Court in *Farmer v. Brennan*<sup>64</sup> and thereby reinforced the Court's subjective test for Eighth Amendment claims.<sup>65</sup> *Farmer v. Brennan* concerned a transsexual prisoner who was violently victimized when he was transferred, over his vocal

interests in personal property in prison cells).

55. *Hutto v. Finney*, 437 U.S. 678, 700 (1978) (endorsing the authority of U.S. district judges to order remedies when prisoners were placed in conditions of inadequate nutrition, communicable diseases, or pervasive violence).

56. *Hope v. Pelzer*, 536 U.S. 730, 734-35, 746 (2002) (identifying Eighth Amendment violation and denying qualified immunity to correction officer defendants who chained a prisoner to a bar in the prison yard without adequate access to shade, water, or toilet facilities).

57. See TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT vii-x (2005).

58. Scott P. Johnson & Christopher E. Smith, *David Souter's First Term on the Supreme Court: The Impact of a New Justice*, 75 JUDICATURE 238, 243 (1992).

59. 501 U.S. 294 (1991).

60. See CHRISTOPHER E. SMITH, LAW AND CONTEMPORARY CORRECTIONS 218 (2000).

61. YARBROUGH, *supra* note 57, at x.

62. See *supra* Table 1.

63. See, e.g., *Bowles v. Russell*, 551 U.S. 205, 215 (2007) (Souter, J., dissenting) (disagreeing with strict enforcement of filing deadlines); *Lindh v. Murphy*, 521 U.S. 320, 326-37 (1997) (interpreting the timing and applicability of limitations on habeas petitions as a result of the Antiterrorism and Effective Death Penalty Act of 1996); *Withrow v. Williams*, 507 U.S. 680, 694-95 (1993) (stating that collateral review through habeas corpus is available for claimed violations of *Miranda* rights).

64. 511 U.S. 825 (1994).

65. See SMITH, *supra* note 60, at 227-28.

protests, to a high-security prison that held many violent offenders.<sup>66</sup> Souter's opinion concluded:

We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.<sup>67</sup>

In contrast to Souter's majority opinion, his liberal colleagues Justices Stevens and Blackmun concurred in the result as a matter of respect for precedent, but each wrote an opinion to protest the continued use of the "deliberate indifference" standard for Eighth Amendment prisoner cases.<sup>68</sup>

Justice Souter's other opinions addressing prisoners' rights concerned constitutional rights lawsuits over allegedly improper imprisonment,<sup>69</sup> the standing requirement for prisoners seeking to challenge the adequacy of their legal resources for pro se litigation,<sup>70</sup> Ex Post Facto Clause violations from changing parole rules,<sup>71</sup> and the authority of federal judges to issue injunctions in prisoner cases.<sup>72</sup> Despite his general level of support for many prisoners' rights claims,<sup>73</sup> as compared to Justice Stevens, Justice Souter was markedly less supportive of and assertive about the protection of prisoners' rights.

3. *Sandra Day O'Connor*.—As an appointee of conservative President Ronald Reagan in 1981,<sup>74</sup> Justice O'Connor demonstrated a conservative voting record in civil rights and civil liberties cases,<sup>75</sup> and she is included by scholars in their lists of "Justices who are conservative on criminal procedure."<sup>76</sup> Yet she had a penchant for seeking middle ground when the Court was deeply divided,<sup>77</sup>

66. *Farmer*, 511 U.S. at 828-30.

67. *Id.* at 837.

68. *Id.* at 851-52 (Blackmun, J., concurring); *see also id.* at 858 (Stevens, J., concurring).

69. *Heck v. Humphrey*, 512 U.S. 477, 491 (1994) (Souter, J., concurring).

70. *Lewis v. Casey*, 518 U.S. 343, 393 (1996) (Souter, J., concurring in part and dissenting in part).

71. *Garner v. Jones*, 529 U.S. 244, 260 (2000) (Souter, J., dissenting).

72. *Miller v. French*, 530 U.S. 327, 350 (2000) (Souter, J., concurring in part and dissenting in part).

73. *See supra* Table 1.

74. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 6 (2007).

75. *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 254 (1993).

76. *Id.* at 30.

77. Justice O'Connor had "importance as an accommodationist on a divided bench where neither the conservative nor liberal bloc held the balance of power and a centrist justice could broker compromise." NANCY MAVEETY, *QUEEN'S COURT: JUDICIAL POWER IN THE REHNQUIST ERA* 4-5 (2008) (citation omitted).



as she did most famously for the issue of abortion.<sup>78</sup> Therefore, she has been characterized as “more influential in the Court majorities than any of her associate colleagues.”<sup>79</sup> Her role as the conservative “*crucial contributor*”<sup>80</sup> in the middle of the Court made her influential in the development of prisoners’ rights jurisprudence.<sup>81</sup>

Justice O’Connor’s most influential prisoners’ rights opinion was *Turner v. Safley*,<sup>82</sup> a case in which the Court faced allegations of two different rights violations: denial of the asserted right to get married and denial of the asserted right to correspond with other prisoners.<sup>83</sup> In the Justices’ initial discussion of the case at conference, four Justices (Rehnquist, Scalia, White, and Powell) concluded that there were no rights violations, and four Justices (Stevens, Brennan, Marshall, and Blackmun) concluded that both rights were violated.<sup>84</sup> Justice O’Connor received the assignment to write the majority opinion because her decisive vote determined the existence of two different 5-4 decisions: one to uphold the regulation on correspondence and the other to reject the regulation prohibiting prisoner marriages.<sup>85</sup> Justice O’Connor created a four-part test, anchored on a rational basis assessment that is deferential to prison officials’ assertions of security concerns,<sup>86</sup> that has subsequently been applied to evaluate an array of constitutional claims by prisoners.<sup>87</sup> Indeed, the conservative Justices were apparently so pleased with the deferential nature of O’Connor’s *Turner* test that they switched their votes and endorsed the Court’s rejection of the marriage regulation.<sup>88</sup>

Meanwhile, the Court’s liberal Justices were so displeased with the formulation of a test that would nearly always lead prison officials to prevail when challenged by prisoners’ rights claims that they redrafted a dissent to

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78. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justice O’Connor co-authored an opinion with Justices Anthony Kennedy and David Souter that preserved *Roe v. Wade*, 410 U.S. 113 (1973), while permitting broader regulation by states, as long as such regulation did not impose an “undue burden” on women’s choices concerning abortion in the first two trimesters of pregnancy. See THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 845-46 (1997).

79. MAVEETY, *supra* note 77, at 4.

80. *Id.*

81. Christopher E. Smith, *Justice Sandra Day O’Connor and Corrections Law*, 32 HAMLINE L. REV. 477, 478-79 (2009).

82. 482 U.S. 78 (1987).

83. *Id.* at 81-82.

84. Smith, *supra* note 81, at 488.

85. *Id.*

86. *Id.* at 489-91.

87. See, e.g., *Beard v. Banks*, 548 U.S. 521, 535 (2006) (finding that prison officials can deny access to publications and family photos); *Overton v. Bazzetta*, 539 U.S. 126, 132-34 (2003) (finding no visitation rights for prisoners).

88. Smith, *supra* note 81, at 489-90.

emphasize that it was too deferential to prison officials.<sup>89</sup> In the words of Justice Stevens's dissent,

if the standard can be satisfied by nothing more than a “*logical connection*” between the regulation and any legitimate penological concern perceived by a cautious warden . . . it is virtually meaningless. Application of the standard would seem to permit disregard for inmates’ constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation.<sup>90</sup>

In another important case, Justice O’Connor wrote the majority opinion that established the test for evaluating claims that corrections officers’ uses of force were excessive and violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>91</sup> In *Whitley v. Albers*, an uninvolved prisoner was seriously injured by a shotgun blast when corrections officers stormed a cellblock to rescue a hostage.<sup>92</sup> Justice O’Connor’s majority opinion emphasized the need for judges to show deference to the judgments of corrections officials.<sup>93</sup> She articulated a test that imposed liability for a rights violation only when corrections officials inflicted “unnecessary and wanton pain” by applying force “maliciously and sadistically for the very purpose of causing harm.”<sup>94</sup> This difficult-to-prove, subjective standard makes it challenging for prisoners to establish that their Eighth Amendment rights have been violated, even in contexts in which they suffer injuries and corrections officers had the option of using less force in the incident.<sup>95</sup> The Court subsequently applied this same subjective standard to the use of force in prison contexts other than the aftermath of significant disorder.<sup>96</sup> For example, a majority of Justices applied the *Whitley* test when corrections officers allegedly beat a handcuffed and shackled prisoner, thereby breaking his tooth and bruising his face.<sup>97</sup>

Justice Thurgood Marshall’s dissent criticized O’Connor’s opinion for suggesting “that the existence of more appropriate alternative measures for controlling prison disturbances is irrelevant to the constitutional inquiry.”<sup>98</sup> Justice Marshall challenged O’Connor and the majority to consider whether they could really accept a decision by “prison officials . . . to drop a bomb on a

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89. *Id.* at 491-92.

90. *Turner v. Safley*, 482 U.S. 78, 100-01 (1987) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

91. *Whitley v. Albers*, 475 U.S. 312 (1986).

92. *Id.* at 314-17.

93. *Id.* at 321-22.

94. *Id.* at 320-21 (citation omitted).

95. Smith, *supra* note 81, at 483-85.

96. *Hudson v. McMillian*, 503 U.S. 1, 7-8 (1992).

97. *Id.* at 4, 7-8.

98. *Whitley*, 475 U.S. at 333 (Marshall, J., dissenting).



cellblock in order to halt a fistfight between two inmates,” even if the innocent prisoners injured by the bomb in the cellblock were unable to prove that corrections officials acted with malicious and sadistic intent.<sup>99</sup>

Although Justice O'Connor created two key tests that make it difficult for prisoners to prevail in legal actions over certain constitutional claims, she resisted efforts by her more conservative colleagues to interpret and apply those tests in ways that would be even more restrictive of prisoners' rights. For example, she rejected the effort by Justices Thomas and Scalia to apply the deferential *Turner* test to prisoners' claims about equal protection violations.<sup>100</sup> Indeed, Justice O'Connor wrote the majority opinion declaring that judges must apply the non-deferential strict scrutiny test,<sup>101</sup> rather than the *Turner* test, to prisoners' claims about racial segregation.<sup>102</sup> After her retirement, when sitting by designation as a member of a panel on the U.S. Court of Appeals for the Eighth Circuit, Justice O'Connor continued to communicate her view that the *Turner* test should be applied only in limited contexts as she joined a unanimous opinion that declined to apply that test in a prisoners' rights case concerning an alleged violation of the Establishment Clause of the First Amendment.<sup>103</sup> With respect to her *Whitley* test for Eighth Amendment violations in use-of-force cases, she resisted efforts by Justices Thomas and Scalia to impose an additional “significant injury” requirement, as she wrote the majority opinion in a case that permitted a prisoner to sue for a beating at the hands of guards that caused “minor” injuries not requiring medical attention.<sup>104</sup> Thus, unlike her more conservative colleagues who reject nearly every constitutional claim by prisoners,<sup>105</sup> Justice O'Connor was open to protecting rights for prisoners in such specific contexts.<sup>106</sup>

4. *William H. Rehnquist*.—Chief Justice Rehnquist was originally appointed to the Court as an Associate Justice in 1971 by President Richard Nixon.<sup>107</sup>

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99. *Id.* at 333-34.

100. *Johnson v. California*, 543 U.S. 499, 530 (2005) (Thomas, J., dissenting).

101. *See HENSLEY ET AL.*, *supra* note 78, at 618 (“Under this strict scrutiny approach, the burden of proof shifts to the government, which must demonstrate that the classification is ‘narrowly tailored’ to achieve a ‘compelling interest.’ . . . [T]his test has been used to strike down many racial classifications.”).

102. *Johnson*, 543 U.S. at 509 (majority opinion).

103. *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007).

104. *Hudson v. McMillian*, 503 U.S. 1, 4, 7-8 (1992).

105. *See, e.g., Christopher E. Smith, The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 603 (1995) (“Justices Thomas and Scalia have established themselves as advocates for a return to the ‘hands-off’ judicial policy of yesteryear with respect to prison conditions and the treatment of convicted offenders.”).

106. For example, Justice O'Connor joined Justice Stevens's majority opinion in *Hope v. Pelzer*, 536 U.S. 730, 745 (2002), which declared that prison officials violated the Eighth Amendment when they chained a prisoner to a bar in the prison yard for many hours without adequate access to shade, water, and toilet facilities.

107. ABRAHAM, *supra* note 27, at 314-16.

Rehnquist was recognized as possessing an “ideologically doctrinaire conservative approach to constitutional law,”<sup>108</sup> and he “quickly became the leader of the ‘right’ or ‘conservative’ wing of the Court.”<sup>109</sup> For example, among all Supreme Court Justices who served from 1946 through 2005, Rehnquist demonstrated the lowest rate of support for defendants’ claims in criminal procedure cases (17.3%).<sup>110</sup> This was a rate even lower than that of his notably conservative colleagues, Justices Thomas (21.1%) and Scalia (25.3%).<sup>111</sup>

As an Associate Justice, Rehnquist wrote notable dissents against the majority’s declarations about prisoners’ right to have access to a law library<sup>112</sup> and the authority of federal judges to issue remedial orders to improve conditions of confinement.<sup>113</sup> Rehnquist wrote the majority opinion in *Bell v. Wolfish* that rejected a variety of claims by federal pretrial detainees, including objections to strip searches when leaving the visiting room.<sup>114</sup> This opinion was viewed as a signal to federal judges to be more deferential to the policies and practices of corrections officials.<sup>115</sup> After he was elevated to the office of Chief Justice by President Ronald Reagan, Rehnquist wrote the majority opinion applying the *Turner* test to a right not discussed in the *Turner* case. He used the test for First Amendment free exercise of religion.<sup>116</sup> Chief Justice Rehnquist took a deferential approach and accepted corrections officials’ reasons for denying low-security Muslim prisoners the opportunity to participate in a weekly prayer service that Rehnquist acknowledged to be of “central importance” to the prisoners’ religious practices and beliefs.<sup>117</sup>

Despite his record of conservatism, Chief Justice Rehnquist joined several opinions that recognized rights for prisoners, including due process rights in certain disciplinary proceedings,<sup>118</sup> a limited right to medical care,<sup>119</sup> and rights related to correspondence between prisoners and outside family members.<sup>120</sup> He strongly advocated for judicial deference to the decisions of corrections

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108. *Id.* at 315.

109. *Id.* at 317.

110. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 535 tbl.6-4 (4th ed. 2007).

111. See *id.* at 536 tbl.6-4. These percentages, as well as the percentage calculated *supra* note 110, were calculated from the Supreme Court Data Base Project.

112. *Bounds v. Smith*, 430 U.S. 817, 837 (1977) (Rehnquist, J., dissenting).

113. *Hutto v. Finney*, 437 U.S. 678, 710 (1978) (Rehnquist, J., dissenting).

114. *Bell v. Wolfish*, 441 U.S. 520, 561-62 (1979).

115. See Christopher E. Smith, *Chief Justice William Rehnquist and Corrections Law*, 31 CORR. COMPENDIUM 6, 7 (2006).

116. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350-51 (1987).

117. *Id.* at 351-52.

118. *Wolff v. McDonnell*, 418 U.S. 539, 543 (1974).

119. *Estelle v. Gamble*, 429 U.S. 97, 107-08 (1976).

120. *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).



officials,<sup>121</sup> yet he used language to demonstrate his recognition that unacceptable prison conditions existed and that judges were sometimes justified in intervening to protect prisoners' rights.<sup>122</sup> Thus, Chief Justice Rehnquist's conservative approach to prisoners' rights was not based on a categorical rejection of the idea that the Constitution protects incarcerated offenders and pretrial detainees.

### *B. Key Returnees*

1. *Clarence Thomas*.—Clarence Thomas was appointed to the Supreme Court in 1991 by President George H. W. Bush with the expectation that he would provide a consistent vote for conservative outcomes.<sup>123</sup> He has fulfilled the expectations of political conservatives,<sup>124</sup> and in the area of prisoners' rights, he has gone beyond merely voting to endorse the policies and practices implemented by corrections officials.<sup>125</sup> Justice Thomas has articulated a new vision of the role of constitutional rights in corrections, or stated more accurately, the near-absence of a role of constitutional rights in prisons and jails.<sup>126</sup>

Justice Thomas's first prisoners' rights case on the Supreme Court was *Hudson v. McMillian*, an Eighth Amendment case concerning a prisoner who sustained minor injuries when beaten by corrections officers as he was led down a hallway in handcuffs and shackles.<sup>127</sup> On behalf of himself and Justice Scalia, Thomas wrote a dissenting opinion that did not merely argue for a "significant injury" requirement in Eighth Amendment excessive-use-of-force lawsuits. Rather, he also argued against the existence of any Eighth Amendment protections for prisoners.<sup>128</sup> Justice Thomas aspires to interpret the Constitution

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121. See *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.").

122. *Id.* at 562 ("The deplorable conditions and Draconian restrictions of some of our [n]ation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems.").

123. See JOYCE A. BAUGH, *SUPREME COURT JUSTICES IN THE POST-BORK ERA: CONFIRMATION POLITICS AND JUDICIAL PERFORMANCE* 42 (2002) ("[T]he nomination was praised by conservative groups who saw Thomas's appointment as a great opportunity to solidify a conservative majority on the Supreme Court which could further repudiate earlier Court rulings, especially on the issue of abortion.").

124. See Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC, *supra* note 43, at 70, 81 ("Justice Thomas is usually a reliable conservative and antilibertarian voice on criminal law matters that do not have free speech dimensions. Persons accused or convicted of crimes rarely gain his vote.").

125. CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* 91-98 (2000).

126. See *id.*

127. *Hudson v. McMillian*, 503 U.S. 1, 4-5 (1992).

128. See *id.* at 18-21 (Thomas, J., dissenting).

according to the Framers' original intentions.<sup>129</sup> Thus, he used his interpretation of history to make this argument:

Until recent years, the Cruel and Unusual Punishments Clause was not deemed to apply at all to deprivations that were not inflicted as part of the sentence for a crime. For generations, judges and commentators regarded the Eighth Amendment as applying only to torturous punishments meted out by statutes or sentencing judges, and not generally to any hardship that might befall a prisoner during incarceration. . . .

Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naïve as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.<sup>130</sup>

The following year, Justice Thomas again wrote a dissent on behalf of himself and Justice Scalia in an Eighth Amendment case in which the majority permitted a lawsuit to proceed based on the risk of physical harm to a non-smoker housed in a cell with a chain-smoking cellmate.<sup>131</sup> Justice Thomas reiterated his originalist argument that the Eighth Amendment does not apply to conditions, actions, and events that occur inside prisons:

Thus, although the evidence is not overwhelming, I believe that the text and history of the Eighth Amendment, together with the decisions interpreting it, support the view that judges or juries—but not jailers—impose “punishment.” At a minimum, I believe that the original meaning of “punishment,” the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged.<sup>132</sup>

Scholars subsequently criticized Justice Thomas for claiming that the Framers were aware of harsh prison conditions and did not intend for the Eighth Amendment to protect prisoners from the effects of such conditions.<sup>133</sup> In reality, the prison was not invented and developed as a mechanism for punishing offenders through long-term incarceration until the nineteenth century.<sup>134</sup> The forms of criminal punishment at the time that the Framers created the Eighth Amendment were execution, whipping, branding, holding in stocks, and other non-incarcerative physical punishments.<sup>135</sup> Jails during that era were used to

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129. Smith, *Bent on Original Intent*, *supra* note 45, at 48.

130. *Hudson*, 503 U.S. at 18-19 (Thomas, J., dissenting).

131. *Helling v. McKinney*, 509 U.S. 25, 35 (1993); *id.* at 37 (Thomas, J., dissenting).

132. *Id.* at 40 (Thomas, J., dissenting).

133. See, e.g., SMITH & BAUGH, *supra* note 125, at 91-92.

134. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 77-82 (1993).

135. See *id.* at 48-50.



house pretrial detainees and debtors. They were not institutions for long-term punitive incarceration.<sup>136</sup> Thus, in writing and ratifying the Eighth Amendment at the end of the eighteenth century, the Framers could not have had awareness, knowledge, or specific intentions concerning an institution that had yet to be developed.

At some point during the following decade, Justice Thomas learned about the history of prisons in the United States; in his concurring opinion in *Overton v. Bazzetta*, he cited the work of several historians in declaring that “[i]ncarceration in the 18th century . . . was virtually nonexistent as a form of punishment” and prisons “were basically a nineteenth-century invention.”<sup>137</sup> This discussion was not a “*mea culpa*” for his previous erroneous assertions regarding the Framers’ awareness about the “harsh conditions” in yet-to-be-invented prisons.<sup>138</sup> Indeed, he made no reference to his prior assertions. Instead, he shifted his approach and based his assertions about the absence of constitutional rights for prisoners on a new theory about the states’ prerogative to define what rights, if any, protect prisoners under each state’s definition of “incarceration”:

The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State’s prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations.<sup>139</sup>

Thomas’s opinion still purported to be an originalist approach that relied on history and traditional practice to guide constitutional interpretation.<sup>140</sup> He simply articulated a new rationale to support his consistent argument that the Constitution provides virtually no rights for prisoners other than a limited right to mail legal petitions to a courthouse.<sup>141</sup> However, even with respect to the one limited aspect of a prisoner’s right of access to the courts, Justice Thomas took an extremely restrictive view by asserting that “[states are] not constitutionally required to finance or otherwise assist the prisoner’s efforts, either through law

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136. *Id.* at 49-50.

137. *Overton v. Bazzetta*, 539 U.S. 126, 142 (2003) (Thomas, J., concurring) (citations omitted).

138. *Hudson v. McMillian*, 503 U.S. 1, 18-21 (1992) (Thomas, J., dissenting).

139. *Overton*, 539 U.S. at 140 (Thomas, J., concurring).

140. *See id.* at 142 (“Moreover, the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association. From the time prisons began to be used as places where criminals served out their sentences, they were administered much in the way Michigan administers them today [with no entitlement to see family visitors].”).

141. *Lewis v. Casey*, 518 U.S. 343, 381 (1996) (Thomas, J., concurring) (“In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court.”).

libraries or other legal assistance. Whether to expend state resources to facilitate prisoner lawsuits is a question of policy and one that the Constitution leaves to the discretion of the States.”<sup>142</sup> To Justice Thomas, this is not actually a “right of access to the courts,” but a “right not to be arbitrarily prevented from lodging a claimed violation of a federal right in . . . court.”<sup>143</sup> Because Justice Thomas would not require the expenditure of state resources in support of a right of access, the right would be illusory for most prisoners, who would lack not only access to material in a law library, but also to pens, paper, envelopes, and stamps necessary to prepare and mail a petition.<sup>144</sup> Thus, Justice Thomas has an extraordinarily limited view of prisoners’ rights. The fact that he replaced one of the Court’s foremost advocates of prisoners’ rights, Justice Thurgood Marshall,<sup>145</sup> means that Justice Thomas’s presence on the Supreme Court for the past two decades represents a significant rightward shift in the votes and opinions on prisoners’ rights cases emanating from that seat on the bench.

2. *Antonin Scalia*.—Appointed to the Supreme Court by President Ronald Reagan in 1986, Justice Scalia has been described by Professor Jeffrey Rosen as “the purest archetype of the conservative legal movement that began in the 1960s in reaction to the Warren Court.”<sup>146</sup> As indicated previously, he is one of the Justices least likely to support a prisoner’s legal claim.<sup>147</sup> Like Justice Thomas, Scalia is an advocate of the originalist approach to interpreting the Constitution.<sup>148</sup> Justice Scalia was the lone Justice to join Justice Thomas’s dissenting opinions that employed erroneous originalist arguments against the application of any Eighth Amendment protections to prisoners.<sup>149</sup> He did not join Justice Thomas’s 2003 opinion that shifted the basis for denying constitutional protections by according deference to states’ definitions of the rights that exist for prisoners during incarceration.<sup>150</sup> In 2006, however, Scalia did endorse Thomas’s view about state authority to control the definition of deprivations—including an absence of rights—associated with incarceration.<sup>151</sup>

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142. *Id.* at 381-82.

143. *Id.* at 381.

144. SMITH & BAUGH, *supra* note 125, at 98.

145. *See, e.g., Rhodes v. Chapman*, 452 U.S. 337, 369 (1981) (Marshall, J., dissenting) (objecting to the placement of two prisoners in a small cell specifically designed to house only one prisoner); *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting) (arguing for the protection of pretrial detainees’ rights); *Estelle v. Gamble*, 429 U.S. 97, 108 (1976) (establishing prisoners’ limited right to medical care under the Eighth Amendment).

146. JOAN BISKUPIC, *AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* 146 (2009) (quoting Jeffrey Rosen, *The Leader of the Opposition*, NEW REPUBLIC (Jan. 18, 1993), <http://www.tnr.com/article/politics/the-leader-the-opposition-0>).

147. *See supra* Table 1.

148. *See* BISKUPIC, *supra* note 146, at 283-84.

149. *See supra* notes 128-36 and accompanying text.

150. *See supra* notes 137-40 and accompanying text.

151. *Beard v. Banks*, 548 U.S. 521, 536 (2006) (Thomas, J., concurring). Justice Scalia joined this opinion.



Justice Scalia exerted significant influence over the definition and existence of prisoners' rights through two majority opinions in which he ingeniously exploited the malleability of judicial language in order to create new precedent that curtailed rights for prisoners.<sup>152</sup> Justice Scalia relied on Justice Thurgood Marshall's majority opinion creating a right of access to prison law libraries as an essential component of the right of access to the courts.<sup>153</sup> What Marshall had written as a step to create a necessary expansion of rights, Scalia subsequently used as if it was intended to define the limit of said right.<sup>154</sup> In addition, Justice Scalia used the concept of standing to make it difficult for prisoners to establish that they need additional legal assistance in order to gain effective access to the courts. He had long advocated the use of standing requirements in order to limit the number of cases—and policy-related issues—that could be placed in front of judges.<sup>155</sup> In this case, his use of the standing requirement created an impenetrable "catch-22" situation for many prisoners with low literacy levels, mental problems, or lack of facility with the English language: they need to go to court on their own, without additional assistance in order to prove that they are unable to go to court on their own, without additional assistance.<sup>156</sup> Obviously, if a prisoner could prove to a judge that he struggles with education, language, or IQ problems, he would simultaneously be proving that he could make use of the courts without the additional assistance that he was requesting. For those who truly needed extra assistance to gain access to the courts, it would be impossible for them to effectively present that need in court, and therefore, they would be effectively barred from asserting their rights in the judicial process.<sup>157</sup> Any impediments to effectively preparing and presenting legal petitions will affect the protection of all rights for prisoners because judicial enforcement of any right depends on a prisoner's access to the courts.<sup>158</sup>

Justice Scalia also altered the test used to examine whether conditions of confinement in prisons violate the Eighth Amendment prohibition on cruel and unusual punishments. In *Wilson v. Seiter*, the Court considered an array of claims about food, ventilation, and other issues at an Ohio prison.<sup>159</sup> In two prior cases about general living conditions, the Supreme Court had made objective assessments concerning whether crowded cells, minimal food, and exposure to communicable diseases violated the Eighth Amendment.<sup>160</sup> The Justices

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152. See Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L.J. 73, 84-91 (2001). Those two opinions were *Lewis v. Casey*, 518 U.S. 343 (1996), and *Wilson v. Seiter*, 501 U.S. 294 (1991).

153. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

154. Smith, *supra* note 152, at 90.

155. *Id.*

156. *See id.*

157. *See id.* at 91.

158. *Id.*

159. *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

160. In the prior cases, *Rhodes v. Chapman*, 452 U.S. 337 (1981), and *Hutto v. Finney*, 437 U.S. 678 (1978), the Justices looked at the actual conditions to make an objective assessment of

examined whether the conditions imposed the “unnecessary and wanton infliction of pain,” were “grossly disproportionate to the severity of the crime,”<sup>161</sup> or “transgress[ed] today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’”<sup>162</sup> In *Wilson*, Justice Scalia avoided discussing these precedents on prison conditions and instead treated as controlling precedent two cases that were about very specific Eighth Amendment issues—medical care<sup>163</sup> and the use of force,<sup>164</sup> neither of which were the focus of the claims in *Wilson*. He selectively chose to use these other precedents in order to announce a new rule requiring a subjective evaluation of prison conditions.<sup>165</sup> Justice Scalia’s opinion required prisoners to prove “deliberate indifference” on the part of corrections officials in order to show that prison conditions violated the Eighth Amendment.<sup>166</sup>

In a concurring opinion, Justice Byron White noted that Scalia’s approach would permit prison officials to preside over inhumane living conditions as long as the prison officials claimed that they cared about the conditions but were unable to improve the situation due to a lack of funding from the state legislature.<sup>167</sup> As Justice Stevens had complained years earlier, when the “deliberate indifference” test was first applied in a prison medical care case, “whether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.”<sup>168</sup> Notwithstanding the criticisms of the four Justices who declined

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“cruel and unusual punishments” instead of relying on a subjective evaluation of the motives of the corrections officials in order to determine Eighth Amendment violations. See *Rhodes*, 452 U.S. at 346-47 (“[J]udgment[s] should be informed by objective factors to the maximum possible extent.’ . . . In *Estelle v. Gamble* . . . we held that the denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. . . . In *Hutto v. Finney* . . . the conditions of confinement in two Arkansas prisons constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than those in *Gamble* and *Hutto*, alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities.” (internal citations omitted)); *Hutto*, 437 U.S. at 687 (“The [district] court took note of the inmates’ diet, the continued overcrowding, the rampant violence, the vandalized cells, and the ‘lack of professionalism and good judgment on the part of maximum security personnel.’ . . . The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court’s conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.” (internal citation omitted)).

161. *Rhodes*, 452 U.S. at 345-347 (citation omitted).

162. *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

163. *Estelle*, 429 U.S. at 98.

164. *Whitley v. Albers*, 475 U.S. 312 (1986).

165. Smith, *supra* note 152, at 84-85.

166. *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991).

167. *Id.* at 311 (White, J., concurring).

168. *Estelle*, 429 U.S. at 116-17 (Stevens, J., dissenting).



to join Scalia's *Wilson* opinion, the precedent has made it significantly more difficult for prisoners to prove that prison conditions violate the Eighth Amendment.<sup>169</sup>

Overall, Justice Scalia's originalist orientation leads him to take a restrictive view of the existence of prisoners' rights. Moreover, his skillful and effective manipulation of precedent has assertively imposed impediments to the effectuation of the right of access to the courts for many prisoners and made it much more difficult for prisoners to prove that substandard prison conditions violate the Eighth Amendment.

3. *Anthony Kennedy*.—Justice Anthony Kennedy, an appointee of President Ronald Reagan, generally supports corrections officials in prisoners' rights cases presented to the Supreme Court.<sup>170</sup> He is well-known for playing a key role in determining case outcomes when the Court is deeply divided.<sup>171</sup> He parted company with the Court's conservatives to provide pivotal votes for liberal majorities to preserve a right of choice for abortion,<sup>172</sup> prevent the criminalization of gay and lesbian adults' private, non-commercial sexual conduct,<sup>173</sup> and prohibit the death penalty for mentally retarded<sup>174</sup> and juvenile murderers,<sup>175</sup> as well as for sex offenders who victimize children.<sup>176</sup> Unlike Justices Scalia and Thomas, Kennedy is not an originalist; thus, as indicated by his decisions concerning capital punishment,<sup>177</sup> he applies the flexible *Trop v. Dulles* standard for determining Eighth Amendment violations.<sup>178</sup> With respect to prisoners' rights generally, however, Justice Kennedy tends to provide a dependable vote in support of corrections' officials policies and practices.

Justice Kennedy has not been assertive in presenting concurring and dissenting opinions in prisoners' rights cases. He has written several majority

169. Smith, *supra* note 152, at 87.

170. See *supra* Table 1.

171. Charles Lane, *Kennedy Reigns Supreme on Court*, WASH. POST, July 2, 2006, at A6.

172. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

173. *Lawrence v. Texas*, 539 U.S. 558 (2003).

174. *Atkins v. Virginia*, 536 U.S. 304 (2002).

175. *Roper v. Simmons*, 543 U.S. 551 (2005).

176. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

177. For example, in *Roper*, Justice Kennedy wrote:

The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

*Roper*, 543 U.S. at 560-61 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

178. *Trop*, 356 U.S. at 100-01 ("[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (internal citation omitted)).

opinions that reject rights claims by convicted offenders. In *McKune v. Lile*, for example, over the objections of four dissenters, Kennedy wrote the plurality opinion and announced the judgment of the Court rejecting a prisoner's assertion of a Fifth Amendment self-incrimination violation.<sup>179</sup> At issue in *McKune* was an institutional treatment program for sex offenders that required an offender to reveal all acts he had ever committed, leaving open the possibility that he could be prosecuted for any admissions.<sup>180</sup> If the offender refused to participate in the treatment program, he faced transfer to a higher-security institution with fewer privileges and more difficult and dangerous living conditions.<sup>181</sup> In *Washington v. Harper*, over the objections of three dissenters, Justice Kennedy wrote the majority opinion permitting state officials to forcibly medicate a mentally ill prisoner.<sup>182</sup> In *Wilkinson v. Austin*, Justice Kennedy spoke for a unanimous Court in rejecting a claim that Ohio prisoners had received inadequate procedural protections before being classified for assignment to a supermax prison.<sup>183</sup> Overall, Justice Kennedy is inclined to support corrections officials' policies and procedures over claimed rights violations that are asserted by prisoners.

4. *Stephen Breyer*.—Justice Breyer was appointed to the Supreme Court by Democratic President Bill Clinton in 1994,<sup>184</sup> and he has been characterized as the Court's "liberal pragmatist."<sup>185</sup> As indicated by his divided record in voting on prisoners' rights cases,<sup>186</sup> he is willing to support claims by prisoners for some issues, but he also joins the conservatives on the Court in supporting corrections officials quite regularly. Justice Breyer has written relatively few opinions in prisoners' rights cases. In *Sandin v. Conner*,<sup>187</sup> he wrote a dissenting opinion that objected to the majority's narrow view of the liberty interests at stake when a prisoner was transferred to administrative segregation as punishment for violating institutional rules.<sup>188</sup> Justice Breyer wrote the majority opinion in *Richardson v. McKnight*, holding that corrections officials at private prisons may not benefit from qualified immunity when they are defendants in prisoners' civil rights lawsuits.<sup>189</sup> He also wrote a dissenting opinion, joined by Justice Stevens, arguing for greater flexibility for judges to issue orders under his interpretation of the Prison Litigation Reform Act.<sup>190</sup> Overall, Justice Breyer is not an

179. *McKune v. Lile*, 536 U.S. 24, 48 (2002) (plurality opinion).

180. *Id.* at 30.

181. *Id.* at 30-31.

182. *Washington v. Harper*, 494 U.S. 210, 236 (1990).

183. *Wilkinson v. Austin*, 545 U.S. 209, 229-30 (2005).

184. Christopher E. Smith et al., *The First-Term Performance of Justice Stephen Breyer*, 79 JUDICATURE 74, 74 (1995).

185. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 206 (2007).

186. *See supra* Table 1.

187. 515 U.S. 472 (1995).

188. *Id.* at 491-505 (Breyer, J., dissenting).

189. *Richardson v. McKnight*, 521 U.S. 399, 411 (1997).

190. *Miller v. French*, 530 U.S. 327, 353-62 (2000) (Breyer, J., dissenting) (discussing the



outspoken defender of broad rights for prisoners.

5. *Ruth Bader Ginsburg*.—Much like Justice Breyer, Justice Ginsburg votes to endorse prisoners' claims for some issues, but she also votes regularly to support corrections officials' actions.<sup>191</sup> She has written very few opinions in prisoners' rights cases. In a rare prisoners' rights opinion by Justice Ginsburg in *Edwards v. Balisok*,<sup>192</sup> her concurrence took a broader view than that of Justice Scalia's majority opinion about the nature of colorable claims when prisoners challenge disciplinary procedures.<sup>193</sup>

In another of her opinions, a dissent joined by Justice Stevens in *Sandin v. Connor*, Justice Ginsburg used broad language about the liberty interests retained by prisoners. This opinion may indicate that she could respond forcefully if a new majority on the Roberts Court seeks to issue new decisions diminishing prisoners' procedural rights. In this case concerning the right to due process for a prisoner sent to disciplinary segregation, Ginsburg wrote:

I see the Due Process Clause itself, not Hawaii's prison code, as the wellspring of the protection due . . . [the plaintiff]. Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others. Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the "Liberty" enshrined among "unalienable Rights" with which all persons are "endowed by their Creator. . . ."

Deriving the prisoner's due process right from the code for his prison, moreover, yields this practical anomaly: a State that scarcely attempts to control the behavior of its prison guards may, for that very laxity, escape constitutional accountability; a State that tightly cabins the discretion of its prison workers may, for that attentiveness, become vulnerable to constitutional claims. An incentive for ruleless prison management disserves the State's penological goals and jeopardizes the welfare of prisoners.

To fit the liberty recognized in our fundamental instrument of government, the process due by reason of the Constitution similarly should not depend on the particularities of the local prison's code. Rather, the basic, universal requirements are notice of the acts of misconduct prison officials say the inmate committed, and an opportunity to respond to the charges before a trustworthy decisionmaker.<sup>194</sup>

The viewpoint expressed by Justice Ginsburg in this opinion echoes Justice Stevens's broad support for prisoners' rights, at least with respect to due process

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Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996)).

191. See *supra* Table 1.

192. 520 U.S. 641 (1997).

193. *Id.* at 649-50 (Ginsburg, J., concurring).

194. *Sandin v. Connor*, 515 U.S. 472, 489-90 (1995) (Ginsburg, J., dissenting) (internal citations omitted).

issues.

### *C. Summary Assessment of Justices at Point of Transition to a New Era*

As indicated by the foregoing discussion, the Supreme Court has lost its most ardent and outspoken advocate for prisoners' rights: Justice Stevens, as well as the Justice who, after Stevens, was most likely to vote in support of prisoners' claims (Justice Souter). Their retirements raise questions about whether their replacements will be as supportive of prisoners' rights and whether any Justice will assume Justice Stevens's role of consistently articulating arguments for the importance of prisoners' rights. For the latter role, it is possible that remaining Justices Ginsburg and Breyer will be more proactive in choosing to write concurring and dissenting opinions that defend prisoners' rights. However, their voting records in prisoners' rights cases<sup>195</sup> and infrequent opinions in such cases provide little evidence that Rehnquist Court holdovers will fill the advocacy role previously performed by Justice Stevens.

The two conservative retirees, Chief Justice Rehnquist and Justice O'Connor, both acknowledged the existence of prisoners' rights. Rehnquist was seldom supportive of recognizing more than limited rights, while O'Connor was instrumental in developing the key test for determining whether specific rights claims would prevail over corrections officials' implemented policies and practices. Although they were not defenders of prisoners' rights in their votes and opinions, they were more supportive of prisoners' rights than the conservative Justices who remain on the Court. Justice Kennedy has been much like Rehnquist and O'Connor in voting to support corrections officials' practices,<sup>196</sup> and like Rehnquist and O'Connor, Kennedy has not written opinions advocating wholesale changes in prisoners' right precedents. By contrast, Justices Thomas and Scalia are quite explicit about their desire to overturn precedents and thereby drastically constrict, if not eliminate, most constitutional protections for prisoners. Thus, the key question for the transition into the Roberts Court era is whether Thomas and Scalia will gather sufficient support from Kennedy and the newcomers in order to create significant changes in the law of prisoners' rights.

## II. THE ROBERTS COURT

The Roberts Court era officially began after the death of Chief Justice Rehnquist in 2005 led to the appointment and confirmation of Chief Justice John Roberts.<sup>197</sup> The new Supreme Court did not present significant possibilities for differentiating itself from the Rehnquist Court, however, until the departure of a critical mass of Justices created the possibility that the high court could decide cases in a distinctively different way with new combinations of Justices determining case outcomes and precedential reasoning. The retirement of Justice

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195. See *supra* Table 1.

196. See *id.*

197. See Stolberg & Bumiller, *supra* note 9.



Stevens in 2010 meant that there were a total of four new Justices added to the Court since 2005. As a result, genuine possibilities for new directions existed, especially as the newest Justices were not merely carbon-copy replacements of the departed Justices.

### A. *The New Justices*

1. *John G. Roberts*.—Chief Justice John Roberts came to the Supreme Court with prior experience as both a Deputy Solicitor General who presented cases to the Court and as a federal appellate judge.<sup>198</sup> In the Solicitor General's office, he actually had the experience of appearing before the Supreme Court in 1991 to argue in favor of the prisoner's claim<sup>199</sup> in *Hudson v. McMillian*, an Eighth Amendment case concerning an assault committed upon a handcuffed prisoner by corrections officers.<sup>200</sup> He returned in 1993 to argue against the prisoner's claim<sup>201</sup> in *Helling v. McKinney*.<sup>202</sup> The case concerned whether a prisoner housed with a chain-smoking cellmate could pursue an Eighth Amendment claim based on potential future harms to his health.<sup>203</sup> One cannot infer from these advocacy experiences any specific conclusions about Chief Justice Roberts's viewpoints about prisoners' rights. He may have had a role in determining the U.S. government's position in each case, but he did not have the ultimate authority over the argument to be presented; that authority rested with higher officials in the Solicitor General's office and the Department of Justice. These experiences do indicate, however, that Roberts had knowledge about Eighth Amendment issues in prisons prior to becoming a judge.

Although "Chief Justice Roberts is not wedded to a single judicial methodology like the originalism and textualism that are the touchstones for Justices Scalia and Thomas,"<sup>204</sup> his voting record in criminal justice cases is consistently conservative.<sup>205</sup> Overall, Jeffrey Toobin concluded that "Roberts's

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198. Todd S. Purdum et al., *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N.Y. TIMES, July 21, 2005, available at <http://www.nytimes.com/2005/07/21/politics/21nominee.html>.

199. *Hudson v. McMillian*, 503 U.S. 1, 3 (1992); see also *Hudson v. McMillian*: U.S. Supreme Court Case Summary and Oral Argument, OYEZ PROJECT, [http://www.oyez.org/cases/1990-1999/1991/1991\\_90\\_6531](http://www.oyez.org/cases/1990-1999/1991/1991_90_6531) (last visited May 29, 2011).

200. *Hudson*, 503 U.S. at 4.

201. See *Helling v. McKinney*: U.S. Supreme Court Case Summary & Oral Argument, OYEZ PROJECT, [http://www.oyez.org/cases/1990-1999/1992/1992\\_91\\_1958](http://www.oyez.org/cases/1990-1999/1992/1992_91_1958) (last visited May 29, 2011).

202. 509 U.S. 25 (1993).

203. *Id.* at 27-28.

204. Adam Liptak, *The Roberts Court Comes of Age*, N.Y. TIMES, June 29, 2010, at A1, available at <http://www.nytimes.com/2010/06/30/us/30scotus.html>.

205. Madhavi M. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2008-2009 Term*, 29 MISS C. L. REV. 1, 7 tbl.4 (2010); Michael A. McCall et al., *Criminal Justice and the U.S. Supreme Court's 2007-2008 Term*, 36 S.U. L. REV. 33, 42 tbl.3 (2008); Michael A. McCall et al., *Criminal Justice and the 2006-2007 United States Supreme Court Term*, 76 UMKC L. REV. 993,

record is not that of a humble moderate but, rather, that of a doctrinaire conservative.”<sup>206</sup> With respect to the Eighth Amendment, Roberts did differentiate himself from the Court’s other conservatives—Justices Scalia, Thomas, and Alito—by concluding that a sentence of life without possibility of parole for a juvenile who commits a non-homicide offense can, in some cases, violate the Eighth Amendment prohibition on cruel and unusual punishment.<sup>207</sup> It is not yet known how his views about the Eighth Amendment might apply to prisoners’ rights cases because he has consistently voted to uphold the prerogatives of “the executive branch over the legislature.”<sup>208</sup> Therefore, it is natural to wonder whether he will be less protective of the Eighth Amendment in the executive-branch domain of prison administration.

The primary difference between Chief Justice Roberts and his predecessor, Chief Justice Rehnquist, may involve the perception of many commentators that Roberts is intent on leading the Court aggressively toward reshaping the law in a conservative manner on many issues.<sup>209</sup> As noted by one commentator,

Indeed, the [C]ourt appears poised to move to the right . . . Chief Justice Roberts has certainly been planting the seeds . . . If his reasoning takes root in future cases, the law will move in a conservative direction on questions as varied as what kinds of evidence may be used against criminal defendants and the role the government may play in combating race discrimination.<sup>210</sup>

In his role as Chief Justice, Rehnquist took a stand against the elimination of *Miranda* rights as a matter of preserving established precedent rather than following his judicial philosophy.<sup>211</sup> By contrast, observers have noted Roberts’s (as well as other conservative Justices’) support for overruling precedents concerning a variety of issues.<sup>212</sup> Indeed, U.S. Senator Sheldon Whitehouse (D-

998 tbl.3 (2008) [hereinafter McCall et al., *2006-2007 United States Supreme Court Term*].

206. Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER, May 25, 2009, at 42, available at [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin).

207. *Graham v. Florida*, 130 S. Ct. 2011, 2036 (2010) (Roberts., C.J., concurring).

208. Toobin, *supra* note 206, at 42.

209. See, e.g., Adam Cohen, *Last Term’s Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007, available at <http://www.nytimes.com/2007/07/09/opinion/09mon4.html>; Simon Lazarus, *The Most Activist Court*, AM. PROSPECT, June 29, 2007, available at [www.prospect.org/cs/articles?article=the\\_most\\_activist\\_court](http://www.prospect.org/cs/articles?article=the_most_activist_court).

210. Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, June 30, 2009, at A1, available at <http://www.nytimes.com/2009/07/01/us/01scotus.html>.

211. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.”).

212. See, e.g., E.J. Dionne, *Alito Draws Spotlight on Activist Court*, COLUMBUS DISPATCH, Feb. 3, 2010, available at [http://www.dispatch.com/live/content/editorials/stories/2010/02/03/dion02.ART\\_ART\\_02-03-10\\_A11\\_EQGFUJO.html?sid=101](http://www.dispatch.com/live/content/editorials/stories/2010/02/03/dion02.ART_ART_02-03-10_A11_EQGFUJO.html?sid=101) (“[A] truth that many have tried to ignore: The Supreme Court is now dominated by a highly politicized conservative majority intent



R.I.) harshly criticized Chief Justice Roberts for his lack of respect for precedent:

Finally, Roberts announced in his concurring opinion in *Citizens United* [*v. Federal Election Commission*<sup>213</sup>] a theory that, if a precedent is “hotly contested,” it has lesser precedential value and can be replaced. This doctrine would allow a determined group of judicial sappers to selectively undermine and then topple ramparts of precedent with which they disagreed—simply on the basis of their willingness persistently to “hotly contest” those precedents they dislike.<sup>214</sup>

In light of the persistent efforts of Justices Thomas and Scalia to “hotly contest” prisoners’ rights precedents<sup>215</sup> as well as their explicit desire to reverse the Supreme Court’s rights-defining decisions,<sup>216</sup> Roberts’s presence on the Court may help form a critical mass of Justices who are eager to diminish the limited rights possessed by prisoners.

2. *Samuel Alito*.—Justice Samuel Alito, who was confirmed in 2006 after

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on working its will, even if that means ignoring precedents and the wishes of the elected branches of government. . . . On the contrary, I salute . . . [Justice Alito] because his candid response brought home to the country how high the stakes are in the battle over the conservative activism of Chief Justice John Roberts’ [C]ourt.”); Toobin, *supra* note 206 (“[T]he last day of Roberts’s second full term as Chief Justice . . . the Justices overturned a ninety-six-year-old precedent in antitrust law and thus made it harder to prove collusion by corporations. Also that year they upheld the Partial Birth Abortion Ban Act, in Kennedy’s opinion, even though the Court had rejected a nearly identical law just seven years earlier. . . . In all these cases, Roberts and Alito joined with Scalia, Clarence Thomas, and Kennedy to make the majority. On this final day, Breyer offered an unusually public rebuke to his new colleagues. ‘It is not often in the law that so few have so quickly changed so much,’ Breyer said.”).

213. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010). *Citizens United* is a controversial decision in which a narrow majority on the Court shifted from existing law in order to endorse free speech rights for corporations that prevent the government from limiting corporate spending in election campaigns.

214. Sheldon Whitehouse, *Judicial Activism*, NAT’L L.J., Nov. 1, 2010, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202474148401&slreturn=1&hbxlogin=1>.

215. See, e.g., *Beard v. Banks*, 548 U.S. 521, 536 (2006) (Thomas, J., concurring); *Overton v. Bazzetta*, 539 U.S. 126, 140-42 (2003) (Thomas, J., concurring); *Lewis v. Casey*, 518 U.S. 343, 381-82 (1996) (Thomas, J., concurring); *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting); *Hudson v. McMillian*, 503 U.S. 1, 18-21 (1992) (Thomas, J., dissenting); *Wilson v. Seiter*, 501 U.S. 294 (1991); SMITH & BAUGH, *supra* note 125, at 91-98; Smith, *supra* note 152, at 84-91; see also *supra* text accompanying notes 127-69; see generally BISKUPIC, *supra* note 146.

216. See, e.g., *Helling*, 509 U.S. at 42 (Thomas, J., dissenting) (“The text and history of the Eighth Amendment, together with pre-*Estelle* precedent [which established a limited right to medical care for prisoners], raise substantial doubts in my mind that the Eighth Amendment proscribes a prison deprivation that is not inflicted as part of a sentence. And *Estelle* itself has not dispelled these doubts. Were the issue squarely presented, therefore, I might vote to overrule *Estelle*.”)

appointment by President George W. Bush,<sup>217</sup> is significantly more conservative than his predecessor, Justice Sandra Day O'Connor.<sup>218</sup> Justice Alito's voting record shows him to support the claims of individuals in criminal justice cases less frequently than O'Connor did.<sup>219</sup> Like Justices Thomas and Scalia, Alito is an originalist.<sup>220</sup> As demonstrated by the originalist opinions of Thomas, the application of this originalism leads to the rejection of judicial recognition of constitutional rights for prisoners.<sup>221</sup> Moreover, during his confirmation hearings, Justice Alito was less committed to the preservation of precedent than Chief Justice Roberts had been at his confirmation hearings a few months earlier.<sup>222</sup> Indeed, Justice Alito has demonstrated his desire to overturn rights-protecting precedents in criminal justice through the extraordinary action of suggesting during the middle of an oral argument that the Court shift its focus from the narrow issues briefed and argued by the parties and instead consider a wholesale reversal of right-to-counsel precedent.<sup>223</sup> Thus, Justice Alito appears to be a prime candidate to join Justices Thomas and Scalia, and possibly Chief Justice Roberts, in an attempt to curtail prisoners' rights.

3. *Sonia Sotomayor*.—As the appointee of a liberal Democratic President, Justice Sonia Sotomayor was expected to be generally supportive of constitutional rights claims, much like her predecessor, Justice Souter.<sup>224</sup> However, her prior experience as a prosecutor made some observers wonder whether she might be more conservative in criminal justice-related cases.<sup>225</sup>

217. Kirkpatrick, *supra* note 10.

218. See, e.g., Simon Lazarus, *More Polarizing Than Rehnquist*, AM. PROSPECT, May 14, 2007, available at [http://prospect.org/cs/articles?article=more\\_polarizing\\_than\\_rehnquist](http://prospect.org/cs/articles?article=more_polarizing_than_rehnquist) (“[T]he consistently right-leaning Alito has replaced the pragmatic centrist Sandra Day O'Connor . . .”).

219. For example, near the end of her career, Justice O'Connor supported claims by individuals in over 30% of the Court's non-unanimous criminal justice decisions during the 2003-04 term. Smith et al., *supra* note 22, at 133 tbl.4. By contrast, Justice Alito supported individuals' claims in only 6% of the Court's criminal justice cases during his first full term on the Court. McCall et al., *2006-2007 United States Supreme Court Term*, *supra* note 205, at 998 tbl.4.

220. See Steven G. Calabresi, *Introduction*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1, 6 (Steven G. Calabresi ed., 2007) (“Justice Alito . . . seems to be a firm originalist.”).

221. See cases cited *supra* note 215; see also SMITH & BAUGH, *supra* note 125, at 91-98; *supra* text accompanying notes 127-40.

222. See Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, available at <http://www.nytimes.com/2006/01/15/weekinreview/15rosen.ready.html>.

223. Marcia Coyle, *As Nominee Is Announced, High Court Issues Police Interrogation Ruling, Two Others*, NAT'L L.J., May 27, 2009, available at <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202430979440&rss=careercenter&s/return=1&hbxlogin=1>.

224. Greg Stohr, *Sotomayor's Record Suggests Similarities with Souter*, BLOOMBERG NEWS SERV., May 27, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=az1wvdAlNThs&refer=home>.

225. See James Oliphant, *Sotomayor Is Remembered as a Zealous Prosecutor*, L.A. TIMES, June 9, 2009, available at <http://www.latimes.com/news/nationworld/nation/la-na-sotomayor-prosecutor9-2009jun09,0,7206855.story> (“Her experience as an assistant district attorney in New



In her second term on the Court, Justice Sotomayor provided a clue that she may emerge as the Court's new outspoken leader who will defend prisoners' rights. In *Pitre v. Cain*,<sup>226</sup> she wrote a dissent from the Court's denial of certiorari in a case concerning a Louisiana prisoner who was allegedly punished because he stopped taking his AIDS medication as a protest against an impending transfer.<sup>227</sup> As described in Sotomayor's dissent:

He alleges that respondents at the facility punished him for . . . [his refusal to take the medication] by subjecting him to hard labor in 100-degree heat. According to Pitre, respondents repeatedly denied his requests for lighter duty more appropriate to his medical condition, even after prison officials twice thought his condition sufficiently serious to rush him to an emergency room.<sup>228</sup>

The lower courts concluded that his allegations were insufficient to state a plausible Eighth Amendment violation, and his case was dismissed.<sup>229</sup> Justice Sotomayor, alone among all of the Supreme Court Justices, argued that

[e]ven assuming respondents had a legitimate penological interest that outweighed a right to refuse HIV medication, that interest would not permit respondents to punish Pitre, or to attempt to coerce him to take medication, by subjecting him to hard labor that they knew posed "a substantial risk of serious harm."<sup>230</sup>

She further argued that "Pitre's allegations, if true, describe 'punitive treatment [that] amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits.' . . . I cannot comprehend how a court could deem such allegations 'frivolous.'"<sup>231</sup> Her tone and assertiveness in this dissent from denial of certiorari are reminiscent of the prisoners' rights opinions of Justice Stevens,<sup>232</sup> so perhaps Justice Sotomayor will assume his previous role as the Court's prisoners' rights advocate.

4. *Elena Kagan*.—In contrast to Sotomayor, the other Democratic appointee, Justice Elena Kagan,<sup>233</sup> the actual replacement for Justice Stevens in 2010, is so new to the Court that it is impossible to assess how she will decide prisoners' rights cases. Her prior professional experience as a law school dean and Solicitor General of the United States<sup>234</sup> did not require expertise on prisoners' rights cases.

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York made her something of a law-and-order judge, experts say, especially when it came to police searches and the use of evidence.").

226. 131 S. Ct. 8 (2010).

227. *Id.* at 8-10.

228. *Id.* at 8.

229. *Id.*

230. *Id.* at 9 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

231. *Id.* at 10 (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

232. See Smith, *supra* note 26, at 733-36.

233. Baker, *supra* note 12.

234. *Id.*

But her earlier experience as a law clerk for the liberal Supreme Court Justice Thurgood Marshall made her familiar with petitions filed by convicted offenders.

*B. Prisoners' Rights Cases in the Roberts Court Era*

There are, as yet, very few prisoners' rights cases decided by the Roberts Court from which to draw conclusions about the decisionmaking orientations of the replacements for the departed Rehnquist Court Justices. One case involving substantive prisoners' rights was *Beard v. Banks*,<sup>235</sup> which concerned "whether a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates [whose bad behavior led them to be placed in the long-term segregation unit] 'violate[d] the First Amendment.'"<sup>236</sup> Corrections officials claimed that this rule was necessary for security reasons and to create incentive rewards for improved behavior.<sup>237</sup> Over the dissenting opinions of Justices Stevens and Ginsburg, Chief Justice Roberts joined Justices Kennedy and Souter in endorsing the plurality opinion of Justice Breyer that applied the deferential four-part reasonableness test<sup>238</sup> from *Turner v. Safley*.<sup>239</sup> They concluded that the regulation denying access to materials was permissible despite the fact that the practice violated one prong of the *Turner* test by providing no alternative means to exercise the relevant First Amendment right.<sup>240</sup> This was arguably an especially deferential application of an already-deferential test for violations of prisoners' rights.

Yet by joining the Breyer plurality opinion, Chief Justice Roberts distinguished himself from fellow conservatives Justices Thomas and Scalia, whose views were expressed in a concurring opinion by Justice Thomas.<sup>241</sup> Thus, the newcomer did not endorse the more restrictive and distinctive viewpoint, first articulated by Thomas in *Overton v. Bazzetta*,<sup>242</sup> that states define the rights for their own prisoners through their laws, regulations, and policies: "Because the Constitution contains no such definition, '[s]tates are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—provided only that those deprivations are consistent with the

235. 548 U.S. 521 (2006).

236. *Id.* at 524-25 (citation omitted).

237. *Id.* at 531.

238. See SMITH, *supra* note 60, at 88 ("This kind of test is often referred to as a rational basis test (or the *reasonableness test*) in constitutional law.").

239. 482 U.S. 78, 89-91 (1987).

240. See *Beard*, 548 U.S. at 532 ("But these circumstances simply limit, they do not eliminate, the fact that there is no alternative. The absence of any alternative thus provides 'some evidence that the regulations [a]re unreasonable,' but is not 'conclusive' of the reasonableness of the [p]olicy." (citation omitted)).

241. See *id.* at 536 (Thomas, J., concurring).

242. 539 U.S. 126, 138-42 (2003) (Thomas, J., concurring).



*Eighth Amendment.*”<sup>243</sup> This case was decided during Chief Justice Roberts’s first term on the Supreme Court, so it remains to be seen whether his views on the application of the *Turner* test are aligned with those of Justice Breyer or move closer toward the even more restrictive perspectives of Justices Thomas and Scalia.

Justice Alito did not participate in *Beard v. Banks* because he had previously decided the case as a judge on the U.S. Court of Appeals for the Third Circuit.<sup>244</sup> As a member of a three-judge panel on the intermediate appellate court, Alito dissented against the majority’s decision that found in favor of the prisoners.<sup>245</sup> In his dissenting opinion, Alito applied the *Turner* test in a deferential fashion similar to that ultimately applied in Justice Breyer’s plurality opinion.<sup>246</sup> Although it is clear which outcome Justice Alito would have supported on the Supreme Court, it is unknown whether Alito was inclined to join his fellow originalists, Thomas and Scalia, and support their more restrictive view of prisoners’ rights. As a judge on the court of appeals, he was likely to feel obligated to follow the Supreme Court’s precedents by using the *Turner* test rather than utilizing Justice Thomas’s distinctive analytical approach, even if that approach more accurately reflected Justice Alito’s own perspective on constitutional interpretation.

Procedural matters were at the heart of the other cases that have divided the Roberts Court Justices<sup>247</sup> and may shed light on the Justices’ orientation toward prisoners’ claims. In *Bowles v. Russell*,<sup>248</sup> a prisoner relied on a district court’s order which gave him seventeen days to file his appeal from a denial of habeas corpus relief.<sup>249</sup> However, the relevant statute actually only provided a fourteen-day period in which to file such appeals.<sup>250</sup> Justice Thomas wrote the opinion for a conservative majority, also consisting of Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, that declared the fourteen-day deadline to be a strict jurisdictional rule imposed by the statute.<sup>251</sup> In dissent, Justice Souter, on behalf of Justices Stevens, Ginsburg, and Breyer, used uncharacteristically strong language to object to the unfairness of the majority’s strict rule:

The [d]istrict [c]ourt told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on

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243. *Beard*, 548 U.S. at 537 (Thomas, J., concurring) (quoting *Overton*, 539 U.S. at 139).

244. *Banks v. Beard*, 399 F.3d 134 (3d Cir. 2005), *rev’d*, 548 U.S. 521 (2006).

245. *Id.* at 148-50 (Alito, J., dissenting).

246. *Id.* at 149-50.

247. There was one unanimous decision, *Jones v. Bock*, 549 U.S. 199, 223 (2007), in which the Supreme Court decided that the U.S. Court of Appeals for the Sixth Circuit had imposed excessively restrictive rules related to the exhaustion of remedies requirement under the Prison Litigation Reform Act.

248. 551 U.S. 205 (2007).

249. *Id.* at 206-07.

250. *Id.* at 207.

251. *Id.* at 214.

February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.<sup>252</sup>

Souter argued that the Supreme Court should use its equitable authority to recognize an exception under the circumstances of this case in order to advance the interests of fairness.<sup>253</sup> Although this case did not concern constitutional rights for prisoners, it may provide a clue about the sensitivity of Chief Justice Roberts and Justice Alito to issues of fairness in cases involving prisoners and their legal claims.

A similar split in the Court emerged in *Haywood v. Drown*<sup>254</sup> concerning New York's effort to eliminate its state courts' jurisdiction over federal constitutional rights lawsuits by prisoners.<sup>255</sup> In this case, Justice Kennedy provided the decisive fifth vote for Justice Stevens's majority opinion that employed the Supremacy Clause to invalidate New York's actions.<sup>256</sup> Chief Justice Roberts and Justice Alito, along with Justice Scalia, joined Justice Thomas's dissenting opinion.<sup>257</sup> It is possible that this case is most revealing about the Justices' disagreements concerning the Supremacy Clause and federalism rather than prisoners' rights. There is no question, though, that New York's actions were directed specifically at prisoners and their options for pursuing constitutional rights claims in the courts.

### C. Schwarzenegger v. Plata

In November 2010, the Roberts Court, including the four Justices appointed after the close of the Rehnquist Court era, heard oral arguments in *Schwarzenegger v. Plata*.<sup>258</sup> The editors of the *New York Times* called it "the most important case in years about prison conditions."<sup>259</sup> California challenged an order from a special three-judge district court requiring a reduction in prison populations.<sup>260</sup> The lower court found that prison overcrowding was a cause of significant Eighth Amendment violations in conditions of confinement, especially with respect to inadequate medical care.<sup>261</sup> The underlying litigation had been ongoing for twenty years and had been the subject of seventy previous district

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252. *Id.* at 215 (Souter, J., dissenting).

253. *See id.* at 216-17.

254. 129 S. Ct. 2108 (2009).

255. *Id.* at 2111-12.

256. *Id.* at 2117.

257. *Id.* at 2118 (Thomas, J., dissenting).

258. *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 2430820 (E.D. Cal. Aug. 4, 2009), *appeal docketed*, No. 09-1233 (Apr. 14, 2010).

259. Editorial, *The Crime of Punishment*, N.Y. TIMES, Dec. 6, 2010, at A26, *available at* <http://www.nytimes.com/2010/12/06/opinion/06mon1.html>.

260. Marcia Coyle & Tony Mauro, *Hot Bench in Prison Battle*, NAT'L L.J., Dec. 6, 2010.

261. *Id.*



court orders, none of which remedied the prison condition problems.<sup>262</sup> The questions and concerns raised by individual Justices at oral argument may provide clues about their orientations toward prisoners' rights.

Justice Alito questioned the prisoners' attorney about the necessity and potential consequences of a reduction in prison populations.<sup>263</sup> He appeared to be quite skeptical about the desirability of reducing prisoner populations, both because he thought it was merely an indirect means of remedying the prison medical care issues and, more importantly, because he anticipated grave potential harm to society.<sup>264</sup> The former prosecutor used stark terms to raise concerns about a possible increase in crime:

If—if I were a citizen of California, I would be concerned about the release of 40,000 prisoners. And I don't care what you term it, a prison release order or whatever the . . . terminology you used was. If 40,000 prisoners are going to be released, do you really believe that if you were to come back here 2 years after that, you would be able to say they haven't—they haven't contributed to an increase in crime . . . in the State of California? In the—in the amicus brief that was submitted by a number of States, there is an extended discussion of the effect of one prisoner release order with which I am familiar, and that was in Philadelphia; and after a period of time they tallied up what the cost of that was, the number of murders, the number of rapes, the number of armed robberies, the number of assaults. You don't—that's not going to happen in California?<sup>265</sup>

Chief Justice Roberts emphasized a similar point from a different angle by asserting that the district court did not fulfill the requirements of the Prison Litigation Act by failing to give substantial weight to considerations of public safety in any remedial order involving release of prisoners:

I don't see that the district court did what was required by the Act with respect to the plan that it's ordering. . . . It just simply said, oh, we're sure—I'm sure the State wouldn't do anything to hurt public safety—after telling the State you've got to give me a plan in 2 years that gets [the prison population down] to 137.5 [percent of capacity]. . . . Well, they said we're sure, because . . . [the district court said,] "We trust that the State will comply with its duty to ensure public safety as it implements the constitutionally required reduction." The State is saying it cannot meet the 137.5 [percent of capacity] in 2 years without an

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262. *Id.*

263. Transcript of Oral Argument at 42-48, *Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010) (No. 09-1233), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/09-1233.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1233.pdf).

264. *Id.*

265. *Id.* at 47-48.

adverse impact on public safety.<sup>266</sup>

Interestingly, this assertion by Roberts led Justice Sotomayor to lead the prisoners' attorney through a series of statements, effectively seeking to refute Roberts on behalf of the attorney:

JUSTICE SOTOMAYOR: I have several questions but . . . I'm not sure why you have not been responding to Justice—to the Chief Justice. Didn't the district court discuss different safe ways . . . of reducing the population—

MR. SPECTER: Yes.

JUSTICE SOTOMAYOR: —and said, we're not imposing them because we want the State to do—to choose among them?

MR. SPECTER: Yes, Your Honor.

JUSTICE SOTOMAYOR: As I've looked at the State's final plan, I thought that they had in fact not only accepted all of the recommendations, but they added a couple of additional remedies that the court had not suggested.

MR. SPECTER: Yes, Your Honor.

JUSTICE SOTOMAYOR: Is it a fair statement that the district—that the three-judge panel was saying, if you do these things—that's their finding—you can do it without affecting public safety? Wasn't that what they were saying?

MR. SPECTER: Yes, Your Honor. If I didn't make that clear, I meant to.<sup>267</sup>

In addition, when questioning the attorney for California, Justice Sotomayor used graphic references to the nature of the problems in the prisons in order to challenge the state's assertion that it just needed to be given an additional undefined period of time to remedy the problems:

So when are you going to get to that? When are you going to avoid the needless deaths that were reported in this record? When are you going to avoid or get around [to] people sitting in their feces for days in a dazed state? When are you going to get to a point where you're going to deliver care that is going to be adequate?<sup>268</sup>

Justice Kagan's most revealing question was addressed to California's attorney when she expressed skepticism about the Supreme Court second-guessing the lower courts that had been dealing with the details of the case for two decades:

Mr. Phillips, my trouble listening to you is that it seems as though you're asking us to re-find facts. You know, you have these judges who have been involved in these cases since the beginning, for 20 years in the

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266. *Id.* at 51-52.

267. *Id.* at 55-56.

268. *Id.* at 15.



Plata case, who thought: We've done everything we can, the receiver has done everything he can; this just isn't going anywhere and it won't go anywhere until we can address this root cause of the problem.

And that was the view of the judges who had been closest to the cases from the beginning and the view of the three-judge court generally. So how can we reach a result essentially without, you know, re-finding the facts that they have been dealing with for 20 years?<sup>269</sup>

Based on the questions and comments of the new Justices, it appeared that Justices Sotomayor and Kagan were likely to endorse the lower court's order to remedy the prisoners' rights violations that had remained unresolved for decades. By contrast, it also appeared that Chief Justice Roberts and Justice Alito were likely to reject the lower court's order by placing their own concerns about crime above the need to uphold the rights of prisoners. In this case, both sets of Justices may simply cast the same votes that their predecessors would have cast, although there is evidence that both Justice Alito and Chief Justice Roberts may be even less inclined than Justice O'Connor and Chief Justice Rehnquist, respectively, to recognize and protect rights for prisoners.<sup>270</sup>

#### CONCLUSION

Although many states are seeking to reduce their prison populations amid government budget crises,<sup>271</sup> there are still significant numbers of people held in correctional institutions—1.6 million as of the end of 2009.<sup>272</sup> These individuals are entirely dependent on corrections officials for food, shelter, medical care, sanitation facilities, and the other elements of habitable living conditions. Living inside closed institutions, they also face risks that they could be subjected to discrimination, physical abuse, or denial of opportunities to practice their religion unless there are mechanisms to ensure that such abuses and deprivations do not occur. The history of American corrections contains numerous examples of brutality, neglect, and horrific living conditions when corrections officials are unsupervised and unaccountable.<sup>273</sup> Despite some commentators' belief that judges should avoid ordering intrusive remedies for constitutional rights violations,<sup>274</sup> the judicial definition and enforcement of constitutional rights for

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269. *Id.* at 30.

270. *See supra* notes 210-23 and accompanying text.

271. Krissah Thompson, *States Reduce Prison Populations as Budgets Shrink*, WASH. POST, Mar. 3, 2010, available at [www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030302154.html?hpid=moreheadlines](http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030302154.html?hpid=moreheadlines).

272. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISONERS AT YEAREND 2009—ADVANCE COUNTS 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/py09ac.pdf>.

273. *See, e.g.*, *Pugh v. Locke*, 406 F. Supp. 318, 323, 329-30 (M.D. Ala. 1976) (imposing court-ordered remedies for prison conditions deemed "unfit for human habitation" by an officer from the U.S. Public Health Service).

274. *See generally* RICHARD E. MORGAN, *DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN*

prisoners played a key role in improving living conditions and professionalizing and bureaucratizing institutions that were often administered through autocratic fiat and discretionary violence.<sup>275</sup>

As indicated by the preceding sections of this Article, changes in the Supreme Court's composition create the possibility that the nature of support for or opposition to the recognition of specific prisoners' rights has also changed. In particular, the Court has lost its staunchest, most outspoken advocate for prisoners' rights, Justice Stevens.<sup>276</sup> Although newcomer Justice Sotomayor shows signs of fulfilling Justice Stevens's former role,<sup>277</sup> it remains to be seen whether she will actually do so.<sup>278</sup> In addition, Justice Alito is likely to be less supportive of prisoners' rights than was his predecessor, Justice O'Connor, particularly because his originalist perspective may lead him to join the other originalists, Justices Thomas and Scalia, in arguing against the existence of all but the most minimal legal protections for incarcerated offenders.<sup>279</sup> Moreover, Chief Justice Roberts is perceived to be less respectful of precedent than was his predecessor, Chief Justice Rehnquist,<sup>280</sup> so that if so inclined, he could provide an additional vote to contribute to Justice Thomas's stated desire to reconsider prisoners' rights precedent.<sup>281</sup> Because the Court remains split between the Justices who are conservative and those who appear to be relatively liberal, the pace of change may depend on which Justice is next to depart and who resides in the White House at the moment of departure, thereby possessing the authority to choose the replacement.

The most dramatic potential changes in prisoners' rights could develop if Justice Thomas succeeds in gaining a total of five votes to support his distinctive viewpoint. He already has the support of Justice Scalia and probably Justice Alito, the other originalist. Much will depend on whether he can gain the support of Chief Justice Roberts and whoever replaces either Justice Ginsburg (age seventy-seven) or Justice Kennedy (age seventy-four), if either one of them is the

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OUR TIME (1984); ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003).

275. See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

276. See *supra* notes 26-56 and accompanying text.

277. See *supra* notes 225-32, 267-68 and accompanying text.

278. Justice Ruth Bader Ginsburg could also be an outspoken advocate for specific rights for prisoners. However, she is unlikely to fulfill Justice Stevens's extended role as prisoners' rights advocate because her age and health make it unlikely that she will remain on the Supreme Court for many more terms. In 2010, she reached the age of 77. See *Biographies of Current Justices of the Supreme Court*, *supra* note 36. In light of her prior bouts with colon cancer and pancreatic cancer, she is likely to be nearing the end of her career. Carrie Johnson & Rob Stein, *Ginsburg Undergoes Surgery for Cancer*, WASH. POST, Feb. 6, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/05/AR2009020501695.html>.

279. See *supra* notes 217-23, 264-67 and accompanying text.

280. See *supra* notes 209-14 and accompanying text.

281. See *supra* note 215 and accompanying text.



next Justice to retire.<sup>282</sup> In general, Justice Thomas argues that incarcerated offenders possess only those rights granted to them by the states under each state's own definition of "incarceration" and the deprivations attendant to incarceration.<sup>283</sup> Specifically, Justice Thomas has expressed a desire to reconsider the precedent of *Estelle v. Gamble*, reversal of which would eliminate prisoners' limited right to medical care and eliminate the original precedent that made the Eighth Amendment applicable to conditions inside prisons.<sup>284</sup> Because he advocates that the Cruel and Unusual Punishment Clause only applies to sentences announced by judges and not to the implementation of those sentences in prisons,<sup>285</sup> achieving his vision through the alteration of precedent would leave prisoners without any federal constitutional protections against inhumane living conditions and use of excessive force by corrections officers.

In addition, Justice Thomas argues that states have no constitutional duty to supply resources and supplies (such as law libraries, paper, envelopes, and stamps) to aid prisoners in preparing and submitting appeals, habeas corpus petitions, and civil rights lawsuits to the courts.<sup>286</sup> In effect, if Justice Thomas were to attain his vision of prisoners' rights by gaining sufficient votes to eliminate existing precedents with which he disagrees, it appears prisoners would be left with only one limited constitutional right that Justice Thomas is willing to acknowledge: a due process-based right of access to the courts that is limited to prisoners' access to a mail slot where they can place letters to a courthouse, provided they have their own resources with which to write and mail those letters.<sup>287</sup> With such a limited version of the right of access to the courts, it would not be possible for most prisoners to file habeas petitions and other actions for vindicating legal rights. Although the vision of Justice Thomas may sound too extreme to become a reality in our modern twenty-first century, due to changes in the Court's composition, he may be within one vote of achieving his restrictive vision and thereby transforming—through extreme limitations—the supervisory role that federal courts have played to protect against inhumane policies and practices in prisons.

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282. Justice Ginsburg was born in 1933, and Justice Kennedy was born in 1936. *Biographies of Current Justices of the Supreme Court*, *supra* note 36.

283. See *supra* notes 137-39 and accompanying text.

284. See *supra* note 216 and accompanying text.

285. See *supra* note 130 and accompanying text.

286. See *supra* notes 142-44 and accompanying text.

287. *Id.*

# Indiana Law Review

Volume 44

2011

Number 3

## NOTES

### MAKING A LIST, BUT CHECKING IT TWICE? INDIANA'S FOSTER ROSTER AND THE NEED FOR LICENSING REFORM

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#### INTRODUCTION

In January 2008, the Indiana Department of Child Services (DCS) granted Kimberly and Everett Coleman a foster care license that allowed them to care for up to two foster children at a time.<sup>1</sup> Shortly thereafter, the number of children the Colemans were licensed to care for was doubled from two to four.<sup>2</sup> DCS began receiving complaints about the Colemans within three months of granting the license.<sup>3</sup> In the beginning of April 2008, the Colemans met with a DCS caseworker to discuss complaints that the children in their care were unbathed and that the Colemans had misused food vouchers.<sup>4</sup> Nevertheless, DCS maintained the increase in the number of children the Colemans were licensed to serve and continued to place children in their home.<sup>5</sup> On April 21, 2008, eleven-week-old Destiny Linden was placed with the Colemans, bringing the total number of children in their care at that time to four.<sup>6</sup> Two days later, on April 23,

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1. Tim Evans, *Baby Placed in Foster Home Despite Warnings*, INDIANAPOLIS STAR, July 27, 2008, at A1.

2. *Id.*

3. *Id.*

4. *Id.* It is unclear whether these allegations were ever substantiated against the Colemans, although their foster care license was later revoked on other grounds. Interview with Regina C. Ashley, Deputy Gen. Counsel, Ind. Dep't of Child Servs., and Vonda Ramsey, Background Check/Foster Care Licensing Unit Supervisor, Ind. Dep't of Child Servs., in Indianapolis, Ind. (Nov. 17, 2009). Vonda Ramsey left the employ of DCS on March 24, 2010. E-mail from Regina C. Ashley, Deputy Gen. Counsel, Ind. Dep't of Child Servs., to author (Sept. 3, 2010) (on file with author).

5. Evans, *supra* note 1.

6. *Id.*



2009, a court appointed special advocate<sup>7</sup> worried about the well-being of other children in the Colemans' care filed a report advocating for the removal of all children from the home.<sup>8</sup> The report stated that a ten-year-old girl in the Colemans' care had untreated burn marks on her arms sustained while ironing her clothes and that she was responsible for feeding, bathing, and dressing her one-year-old brother, among other things.<sup>9</sup> Unsatisfied with DCS's response to the report, the advocate filed a motion in court to remove all children from the Colemans' home.<sup>10</sup> On the morning of the hearing on the motion, and just three days after moving in with the Colemans, Destiny was found unconscious.<sup>11</sup> She died five days later.<sup>12</sup> Her death was the result of being placed in an unsafe sleeping position.<sup>13</sup>

Unfortunately, the death of children in foster care from abuse or neglect is not uncommon in Indiana,<sup>14</sup> and the maltreatment of children in foster homes across the country is well-documented.<sup>15</sup> In 2008, there were ninety-nine cases of abuse and neglect of foster children substantiated against licensed foster caregivers in

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7. In Indiana, a court appointed special advocate is defined as "a community volunteer who: (1) has completed a training program approved by the court; (2) has been appointed by a court to represent and protect the best interests of a child; and (3) may research, examine, advocate, facilitate, and monitor a child's situation." IND. CODE § 31-9-2-28 (2011). Court appointed special advocates interview the child and others involved in the case and prepare reports for the court recommending what is in the child's best interest. See *About Us*, CHILD ADVOCATES, INC., <http://www.childadvocates.org/what.htm> (last visited Feb. 25, 2011).

8. Evans, *supra* note 1. The report was filed with respect to children in the Colemans' care other than Destiny Linden because the volunteer was not assigned to advocate for her. However, the report did recommend that all children be removed from the Colemans' home. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; see also Tim Evans, *Mother Blames DCS for Son's Death*, INDIANAPOLIS STAR, Apr. 2, 2009, at A13, available at <http://www.indy.com/posts/mother-blames-dcs-for-son-s-death> (discussing five-month-old Mason Brown, who was found unconscious in his crib at his foster parents' home and pronounced dead at the scene). The Colemans' foster care license was not revoked until six months after Destiny's death. See Letter from Regina C. Ashley, Deputy Gen. Counsel, Ind. Dep't of Child Servs., to Everett and Kimberly Coleman, foster parents (Oct. 31, 2008) (on file with author).

14. See Tim Evans, *No Staff. Little Funding. No Mandate. 15 Child Deaths.*, INDIANAPOLIS STAR, Dec. 13, 2009, at A1 (noting that at least fifteen children have died in Indiana while involved in an active or recently closed DCS cases since September 2007).

15. See Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 439 (1996) ("Whether the original decision to place children is justified or not, the children's subsequent treatment in the child welfare system often constitutes abuse and neglect of its own . . ."); Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204 (1988) ("[I]t is well-established that . . . [foster children] are at high risk of further maltreatment while in foster care.").

Indiana (seventy-three cases of neglect, nineteen cases of physical abuse, and seven cases of sexual abuse).<sup>16</sup> The Annie E. Casey Foundation, a not-for-profit research and charitable organization, publishes an annual national report detailing the well-being of children in all fifty states.<sup>17</sup> In 2009, the Annie E. Casey Foundation ranked Indiana thirty-first out of all states for overall child well-being and forty-first for child deaths per 100,000 children.<sup>18</sup>

State authorities are justified in removing children from their homes and placing them in foster care when foster care placement provides a safer environment than the homes from which the children are removed.<sup>19</sup> However,

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16. STATE OF IND., DEP'T OF CHILD SERVS., DEMOGRAPHICS AND TRENDING REPORT STATE FISCAL YEAR 2008 (JULY 1, 2007 TO JUNE 30, 2008), at 125 (2009) [hereinafter DEMOGRAPHICS AND TRENDING REPORT], available at [http://www.in.gov/dcs/images/D\\_\\_T\\_SFY\\_2008\\_Data\\_Report.pdf](http://www.in.gov/dcs/images/D__T_SFY_2008_Data_Report.pdf).

17. ANNIE E. CASEY FOUND., 2009 KIDS COUNT DATA BOOK 6 (2009), available at [http://www.aecf.org/~media/Pubs/Other/123/2009KIDSCOUNTDataBook/AEC186\\_2009\\_KC\\_DB\\_FINAL\\_72.pdf](http://www.aecf.org/~media/Pubs/Other/123/2009KIDSCOUNTDataBook/AEC186_2009_KC_DB_FINAL_72.pdf). The Annie E. Casey Foundation ranks the states based on a composite score of the underlying statistics. *Id.* at 40. The report looks at ten key indicators of child well-being: (1) percent low-birthweight babies; (2) infant mortality rate; (3) child death rate; (4) teen death rate; (5) teen birth rate; (6) percent of teens who are high school dropouts; (7) percent of teens not attending school and not working; (8) percent of children living in families where no parent has full-time, year-round employment; (9) percent of children in poverty; and (10) percent of children in single-parent families. *Id.* at 34. The child well-being rankings in the report are based on cumulative data for all children in each state, not just children in foster care. *Id.* at 32 (noting that the data assess the "status of America's children"); see also Letter from Regina C. Ashley, Deputy Gen. Counsel, Ind. Dep't of Child Servs., to author (Sept. 17, 2010) (on file with author) (pointing out that the *Kids Count Data Book* analyzes all children in a state, not just foster children, and many of the reported statistics are demographic issues out of DCS's control). Nevertheless, the Annie E. Casey Foundation report was used to determine two states against which to compare Indiana's foster care licensing regime based on data availability, frequency of reporting, and ease of access. The report was solely used to determine comparison states and was not used substantively to evaluate the strength of Indiana's foster care system. DCS suggests that its practice indicator reports and federal child and family service review results provide more relevant data. Letter from Regina C. Ashley, *supra*. For example, in fiscal year 2009, Indiana had a 92.7% rate of absence of repeat maltreatment and a 99.56% rate of absence of child abuse and neglect in foster care. *Id.* These rates fall short of the national standard but surpass the federal goal set for Indiana in its program improvement plan. *Id.* Clearly, Indiana is making strides in improving its child welfare outcomes, and some of these efforts are detailed later in this paper. Assessing other states' child welfare systems is simply another evaluative method for improving Indiana's services to vulnerable children.

18. ANNIE E. CASEY FOUND., *supra* note 17, at 41, 47.

19. See Mushlin, *supra* note 15, at 204 (noting that the purpose of foster care is to provide a safe haven for children); see also Laura A. Harper, Note, *The State's Duty to Children in Foster Care—Bearing the Burden of Protecting Children*, 51 DRAKE L. REV. 793, 795 (2003) (discussing how children are removed from their homes when a social service agency finds it unsafe for them to remain there).



Destiny's story demonstrates that Indiana children are not always safe in foster care. Simply stated, Indiana needs to do a better job of screening potential foster homes and monitoring current licensees for continued compliance to ensure that Indiana's foster homes are safe and nurturing places for embattled children.

The purpose of this Note is to analyze how the states with the highest rankings in the 2009 Annie E. Casey Foundation report structure their foster care licensing regimes and to propose changes to Indiana law that will better protect children placed in foster homes from inexcusable abuse and neglect. Part I analyzes the current Indiana statutes and administrative regulations pertaining to foster care licensing, focusing on "trigger" events that necessitate denial or revocation of a license. Part II examines the shortcomings of recent reform efforts in Indiana, including Governor Daniels's mandated increase in the number of DCS caseworkers, the requirement that a guardian ad litem or court appointed special advocate be assigned to each child abuse and neglect case, and the creation of an independent third-party ombudsman to oversee DCS. Part III surveys the licensing schemes of New Hampshire and Minnesota, the states ranking first and second, respectively, in the same report that ranked Indiana thirty-first for overall child well-being. Finally, Part IV proposes changes to Indiana's licensing scheme modeled on the strengths discerned in the New Hampshire and Minnesota systems.

### I. FOSTER CARE LICENSING IN INDIANA

As of September 30, 2009, Indiana had 5436 children in foster care.<sup>20</sup> At that time, there were 2719 foster homes licensed directly by DCS and another 2439 foster homes licensed by state-approved private child placing agencies.<sup>21</sup> DCS family case managers oversee children in foster care and those who remain in their homes but whose families receive ongoing services.<sup>22</sup> Case managers are either initial assessment family case managers (those who handle and investigate initial reports of child abuse or neglect and determine whether to remove children from home) or ongoing family case managers (those who handle the ongoing cases, whether the children remain in the home or are placed in out-of-home care, and are responsible for their permanency plans).<sup>23</sup> Initial assessment workers'

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20. IND. DEP'T OF CHILD SERVS., PRACTICE INDICATOR REPORT, CHINS PLACEMENTS BY COUNTY (2009), *available at* [http://www.in.gov/dcs/images/\(B-D\)Placement\\_Trendline\\_-\\_2009-09.pdf](http://www.in.gov/dcs/images/(B-D)Placement_Trendline_-_2009-09.pdf). It is unclear whether this figure includes children who are placed with licensed relative caregivers. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.

21. IND. DEP'T OF CHILD SERVS., ACTIVE LICENSED FOSTER HOMES FOR DCS AND LCPAS AS OF 9/30/2009 (statistical report on file with author).

22. IND. CODE § 31-25-2-5 (2011).

23. *Id.* A permanency plan is part of the federally mandated case plan that is required in order for states to receive federal foster care maintenance payments. *See* 42 U.S.C. § 675(1) (2006) (defining "case plan"). The permanency plan describes the ultimate goal for the child's permanent placement and elucidates concrete steps to achieve that goal. *See* IND. CODE § 31-34-15-4 (mandating that a case plan include "a permanent plan for the child"). Permanent placement

caseloads are statutorily mandated to average no more than twelve cases per worker, and ongoing case managers' caseloads are required to average no more than seventeen cases per worker.<sup>24</sup> However, the standard only indicates the target average caseload; variations above the average do exist for individual family case managers. For example, an ongoing DCS family case manager in Marion County stated that although she typically handles between eighteen and twenty-two cases at once, she has had up to thirty-five cases at a time.<sup>25</sup>

#### *A. Initial Foster Home Licensure*

To obtain an initial foster care license in Indiana, applicants must complete a comprehensive application.<sup>26</sup> Foster care licensing is performed jointly by DCS and state-approved licensed child placing agencies (LCPAs).<sup>27</sup> LCPAs conduct home studies, investigate applicants, and then input the application information into a computer system.<sup>28</sup> DCS then approves or denies the license based on the information from the LCPAs.<sup>29</sup> DCS also directly licenses homes through its individual county offices.<sup>30</sup>

Federal law mandates minimum requirements for background checks on foster care applicants.<sup>31</sup> States wishing to receive federal matching funds for foster care maintenance payments must perform a national fingerprint-based criminal history check and a central registry check on all applicants.<sup>32</sup> The central registry check looks for prior child protective services history in the state where the applicant applied for a license and any state in which the applicant lived in the five years prior to applying.<sup>33</sup> States are required to cooperate with equivalent requests from other states regarding background checks for child protective

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options include reunification with family, termination of parental rights, or adoption. *See* 45 C.F.R. § 1356.21(g) (2008).

24. IND. CODE § 31-25-2-5(a). DCS's September 2009 fact sheet states that seventeen out of eighteen total regions are in compliance with the 12:17 staffing level standard. IND. DEP'T OF CHILD SERVS., DCS FACTS (2009), *available at* [http://www.in.gov/dcs/images/DCS\\_Fact\\_Sheet\\_2009-09.pdf](http://www.in.gov/dcs/images/DCS_Fact_Sheet_2009-09.pdf).

25. E-mail from Andrenesia Gray, Family Case Manager, Marion Cnty. Dep't of Child Servs., to author (Nov. 9, 2009) (on file with author).

26. IND. CODE § 31-27-4-5(a)-(b).

27. *Id.* § 31-27-4-14 (giving DCS the authority to delegate the home study and investigation portions of foster home licensure to LCPAs).

28. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.

29. *Id.*

30. *Id.* Some DCS local county offices currently outsource the home studies to outside contractors, but a majority conduct the home studies themselves. DCS's goal is to cease outsourcing and have "foster care specialists," DCS employees charged with recruiting, licensing, and retaining foster homes, perform these functions. *Id.*

31. 42 U.S.C. § 671(a)(20) (2006).

32. *Id.*

33. *Id.* § 671(a)(20)(B)(i).



services history.<sup>34</sup> Reciprocity is accomplished through state laws allowing the release of records to comparable authorities in other states for background checks.<sup>35</sup> In compliance with federal requirements, DCS or the LCPA conducts a national fingerprint-based criminal history check on the applicant and all household members ages fourteen and older.<sup>36</sup> Licensing authorities then determine whether the applicant or any household members ages fourteen and older have any history with child protective services and whether they are listed on violent or sex offender registries.<sup>37</sup>

After completing the background check, licensing authorities investigate the home and its residents, interviewing relevant parties and ensuring that the home meets licensure requirements.<sup>38</sup> The home must have the following amenities: heat; a dining room large enough for the foster children to eat at the family table; an individual bed with a mattress and bedclothes for each child; closet and drawer space for each child; an area for studying; and “recreational facilities” for play.<sup>39</sup> The home must comply with sanitary laws pertaining to water supply and sewage disposal as well.<sup>40</sup>

In addition to passing the background check and meeting the physical environment requirements, Indiana requires that “[f]oster parents . . . be mature individuals who are capable of exercising and do exercise good judgment in the handling of a child.”<sup>41</sup> Certain requirements are enumerated under this “maturity” standard, including that the applicant have income sufficient to support children in his or her care and maintain a reasonable quality of life.<sup>42</sup> The applicant must also demonstrate that he or she understands the nutritional needs of children.<sup>43</sup> However, DCS does not have a policy concerning how licensing authorities should assess an applicant’s knowledge of children’s nutritional needs.<sup>44</sup> Guidance on proper feeding principles is also absent from the *Foster Family Resource Guide*, a comprehensive manual given to all licensed foster parents.<sup>45</sup>

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34. *Id.* § 671(a)(20)(B)(ii).

35. *See, e.g.*, MINN. STAT. ANN. § 626.556(10g) (West, Westlaw through 2011 Reg. Sess.); N.H. REV. STAT. ANN. § 169-C:35(VI) (2002), *amended by* 2010 N.H. Laws 160 (2010) (allowing private adoption agencies the same access to records).

36. IND. CODE § 31-27-4-5(d), (e)(2) (2011).

37. IND. DEP’T OF CHILD SERVS., CHILD WELFARE MANUAL, CH. 12, § 30, <http://www.in.gov/dcs/2354.htm> (last visited Mar. 7, 2011) [hereinafter CHILD WELFARE MANUAL].

38. IND. CODE § 31-27-4-10.

39. 465 IND. ADMIN. CODE 2-1-4 (2011).

40. *Id.* at 2-1-5.

41. *Id.* at 2-1-3(a). License revocations are commonly premised on the licensee’s failure to meet this requirement. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4. In fact, the Colemans’ license was revoked on this ground. Letter from Regina C. Ashley to Everett and Kimberly Coleman, *supra* note 13.

42. 465 IND. ADMIN. CODE 2-1-3(c).

43. *Id.* at 2-1-7.

44. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.

45. *See* IND. DEP’T OF CHILD SERVS., INDIANA FOSTER FAMILY RESOURCE GUIDE, *available*

An applicant cannot be licensed if more than eight children (including biological children or children for whom the applicant is a guardian) under age eighteen or more than four children under age six reside in the home at the same time.<sup>46</sup> Finally, the applicant must complete twenty hours of pre-service training and a first aid course before DCS will issue a license.<sup>47</sup> Thereafter, the licensee must complete ten hours of in-service training each year and be re-certified in first aid every three years.<sup>48</sup> Current statutory language indicates that issuance of a license is mandatory in cases where an applicant meets all of the necessary criteria.<sup>49</sup>

Sufficient grounds for denial of a license application exist if the applicant has a criminal conviction for a felony or misdemeanor pertaining to the health or safety of a child, has made false statements in the application, or has previously operated a foster home without a license.<sup>50</sup> However, if a household member other than the applicant or a person who has “regular and continuous” contact with the children has a criminal conviction for certain enumerated felonies<sup>51</sup> or a misdemeanor pertaining to child health and safety, the applicant can apply for a waiver that allows such a person to remain in the home.<sup>52</sup> Generally, applicants can file for a waiver of any license requirements by comporting with Indiana Code section 31-27-2-8.<sup>53</sup>

### *B. Foster Home Monitoring and License Revocation*

This section discusses the procedures DCS follows to ensure that foster homes, once licensed, remain compliant with statutory and administrative regulations. It also details the reasons that a foster home license may be revoked. Finally, this section explains the administrative process of revoking a license.

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at <http://www.in.gov/dcs/files/1003NewFosterGuide4Web.pdf> (last visited Mar. 7, 2011).

46. IND. CODE § 31-27-4-8(a) (2011). Because these limitations include foster children, they dictate the number of foster children that a licensee can be licensed to care for. See CHILD WELFARE MANUAL, *supra* note 37, Ch. 12, § 12.

47. 465 IND. ADMIN. CODE 2-1-16(a)-(b). The administrative code merely specifies the required hours of training to be completed. It does not mandate any specific areas in which training must be conducted. *Id.*

48. *Id.* at 2-1-16(b), (d).

49. IND. CODE § 31-27-4-11 (“The department *shall* issue a license to a person who meets all the license requirements when an investigation shows the applicant to be in compliance under this article.” (emphasis added)).

50. *Id.* § 31-27-4-6(a)(1)-(5).

51. These felonies include, among other things, murder, voluntary manslaughter, kidnapping, battery, felony sex offenses, incest, and neglect. *Id.* § 31-27-4-13.

52. *Id.* § 31-27-4-6(b)(2).

53. *Id.* § 31-27-4-12. To receive a waiver of a rule, the applicant must demonstrate in writing that compliance with the rule would create an undue hardship, that the applicant will otherwise be in substantial compliance with the rules, and that noncompliance will not adversely affect the health or safety of children. *Id.* § 31-27-2-8.



1. *Ongoing Monitoring and Reasons for Revocation.*—Once granted, a foster care license is valid for four years.<sup>54</sup> Licensees are required to inform DCS if they experience a reduction in income, wish to change residences, or if the composition of people residing in the home changes.<sup>55</sup> DCS, or the LCPA in the case of foster homes licensed through LCPAs, must visit licensed foster homes at least once annually to ensure continued compliance with licensing requirements.<sup>56</sup> Notification of licensing violations is most often provided by child protective services investigators who respond to a complaint, case managers who visit the home during monthly visits for the children on their caseload, or in-home service providers such as home-based counselors.<sup>57</sup>

Currently, Indiana provides that the following are grounds for revocation of a foster home license: a licensee's criminal conviction for a felony or misdemeanor involving child health or safety; substantiated abuse or neglect, whether committed by the licensee, someone who resides in the home, or someone who has "regular and continuous" contact with the children; a discovery that the licensee made false statements in the license application or other required records; or a finding that the licensee previously operated a foster home without a license.<sup>58</sup> However, the Indiana Court of Appeals has held that these enumerated reasons for revocation are not exhaustive.<sup>59</sup> The most common reason for initiating revocation proceedings is that a complaint regarding abuse or neglect of a child by a foster parent has been substantiated.<sup>60</sup> Another common reason for revocation is when a licensee has committed a violation of licensing rules, combined with a refusal to cooperate with DCS in remedying the violation.<sup>61</sup>

The decision to revoke a license is discretionary in all cases unless the licensee has committed certain enumerated felonies,<sup>62</sup> in which case revocation is mandatory.<sup>63</sup> Statutorily, children do not have to be removed from a foster home until after the license has been revoked,<sup>64</sup> although in practice, children are

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54. IND. CODE § 31-27-4-16(a).

55. 465 IND. ADMIN. CODE 2-1-3(e) (2011).

56. IND. CODE § 31-27-2-5(a)(2).

57. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.

58. IND. CODE § 31-27-4-32.

59. *Taylor v. Ind. Family & Soc. Servs. Admin.*, 699 N.E.2d 1186, 1191 (Ind. Ct. App. 1998).

60. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.

61. *Id.*

62. The enumerated felonies include murder, causing or assisting suicide, voluntary manslaughter, reckless homicide, battery, kidnapping, criminal confinement, carjacking, arson, incest, neglect of a dependent, child-selling, felony sex offenses, felonies involving a weapon, felonies related to controlled substances, and offenses pertaining to material that is obscene or harmful to minors. IND. CODE 31-27-4-13(a).

63. *See id.* § 31-27-4-33(b) (stating that the department "shall" revoke the license of a licensee convicted of certain enumerated felonies but "may" revoke the license for other violations).

64. *Id.* § 31-27-4-30(a) ("After the license of a foster family home is revoked, the department

almost always removed prior to revocation.<sup>65</sup> According to DCS policy, a licensing worker must recommend revocation when there is a substantiated complaint of abuse or neglect against a licensee.<sup>66</sup> However, a licensing worker can, at his or her discretion, refer a waiver request to a background check waiver review team that reviews the request and may issue a waiver that allows the licensee to remain in good standing.<sup>67</sup> Thus, substantiated abuse or neglect at the hands of a foster parent might, in the discretion of the investigating background check waiver review team, lead to the issuance of a plan of correction rather than a request for revocation.<sup>68</sup> Foster parents are typically given two to three months to comply with a plan of correction.<sup>69</sup> If the licensee fails to comply with the plan of correction, the case manager may recommend revocation.<sup>70</sup> A foster parent may still care for foster children while under a plan of correction, notwithstanding the fact that the allegations may later be substantiated.<sup>71</sup>

2. *The Revocation Process.*—In order to revoke a license, DCS must first notify the licensee in writing of the enforcement action, after which the licensee has ten business days to request an informal meeting with DCS.<sup>72</sup> The notice also informs the licensee that he or she has thirty days to request an administrative hearing.<sup>73</sup> Administrative hearings are evidentiary in nature and are presided over by administrative law judges.<sup>74</sup> DCS must issue its final decision within sixty days of the hearing,<sup>75</sup> and the final decision is subject to judicial review.<sup>76</sup>

II. SHORTCOMINGS OF RECENT REFORM EFFORTS

Indiana Governor Mitch Daniels made child welfare reform an integral part of his campaign platform in the 2004 gubernatorial election.<sup>77</sup> Since being elected, Governor Daniels has made great strides in the area of child welfare. This Part details various initiatives that Governor Daniels has implemented during his tenure. First, it discusses the executive order that separated DCS from

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shall notify in writing each person responsible for each child in care, to ensure that the children are removed from the foster family home.”).

65. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.  
66. CHILD WELFARE MANUAL, *supra* note 37, CH. 12, § 21.  
67. *Id.*  
68. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.  
69. *Id.*  
70. CHILD WELFARE MANUAL, *supra* note 37, CH. 12, § 17.  
71. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.  
72. IND. CODE § 31-27-4-22 (2011).  
73. *Id.* § 31-27-4-23. The hearing must be conducted within sixty days of receipt of the request. *Id.*  
74. *Id.* § 4-21.5-3-5.  
75. *Id.* § 31-27-4-25.  
76. *Id.* § 31-27-4-31.  
77. See MITCH DANIELS, AIMING HIGHER: 2004 LEGISLATIVE AGENDA (2004) (providing statistics on child welfare) (PDF on file with author).



the larger family services bureaucracy and called for the hiring of additional case managers. Next, it explores the mandate that an independent court appointed special advocate be assigned to every child abuse and neglect case. Finally, it examines legislation creating an independent third-party ombudsman to oversee Indiana's child welfare system.

### *A. Reduction of Caseloads*

By executive order in January 2005, Governor Daniels created DCS as a freestanding agency separate from the Indiana Family and Social Services Administration.<sup>78</sup> Governor Daniels's professed goal in making DCS a separate entity and hiring new caseworkers was to "better protect[] endangered children."<sup>79</sup> In an attempt to reduce caseloads and better provide for the safety of Indiana's children, the Indiana legislature has allocated funding to hire additional family case managers.<sup>80</sup> As of April 2008, the state had hired 882 caseworkers since Governor Daniels took office, more than doubling the total number of caseworkers from 708 to 1590.<sup>81</sup> Additional regulations require DCS caseworkers to have a college degree in social work or another parallel field.<sup>82</sup> Moreover, new hires are now required to undergo twelve weeks of training and shadowing prior to handling their own cases.<sup>83</sup>

It is indisputable that lowering average caseloads by hiring additional caseworkers allows DCS family case managers to spend more time on each case. Indeed, the improvements made by Governor Daniels have already resulted in more favorable statistics for child deaths due to abuse and neglect throughout the state.<sup>84</sup> However, the majority of case managers hired under Governor Daniels's directive do not handle foster care licensing; they investigate abuse and neglect complaints and oversee existing cases.<sup>85</sup> Although these case managers visit the children on their caseloads and have the authority to request a move from one

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78. *About DCS*, IND. DEP'T OF CHILD SERVS., <http://www.in.gov/dcs/2370.htm> (last visited Mar. 7, 2011) (declaring the need to "provid[e] more direct . . . oversight in . . . [the] protection of children").

79. Governor Mitch Daniels, 2005 State of the State Address (Jan. 18, 2005) (transcript available at <http://www.in.gov/gov/2530.htm>).

80. *About DCS*, *supra* note 78.

81. *State Marks Hiring of 800-Plus New Child Welfare Workers*, INDIANAPOLIS STAR, Apr. 1, 2008, at A4 (on file with author).

82. *Id.*

83. *Id.*; see also *Do You Want to Make a Difference? Consider a Career with Us!*, IND. DEP'T OF CHILD SERVS., JOB OPPORTUNITIES, <http://www.in.gov/dcs/2367.htm> (last visited Mar. 10, 2011).

84. See *State Marks Hiring of 800-Plus New Child Welfare Workers*, *supra* note 81 (comparing statistics from 2007 to those from 2006).

85. See *id.* (noting that the additional caseworkers allow Indiana to meet federal caseload guidelines for initial and ongoing case managers).

foster home to another, they cannot directly affect a licensee's status.<sup>86</sup> Instead, they must refer the foster home to the licensing division for possible investigation.<sup>87</sup> Family case managers sometimes continue to place children in problematic foster homes rather than contact the licensing authorities and request that they initiate revocation proceedings.<sup>88</sup> The problem with this approach is that information regarding unsatisfactory foster homes may not be aptly communicated from one family case manager to another, placing children in potentially dangerous situations.<sup>89</sup> Therefore, lowering caseloads for case managers does not directly improve the quality of available foster care homes.

### *B. Mandatory Advocates for Children*

In addition to creating DCS as a separate entity and authorizing additional case managers, the Indiana legislature also passed legislation in 2005 requiring a guardian ad litem or court appointed special advocate for every child involved in an abuse or neglect case in the state.<sup>90</sup> Prior to this legislation, Indiana was the only state that did not require children involved in abuse or neglect cases to be represented by an attorney, a guardian ad litem, or a court appointed special advocate.<sup>91</sup> By independently interviewing the child, all service providers, and

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86. See E-mail from Andrenesia Gray, *supra* note 25.

87. See *id.* This situation is not unique to Indiana. See Marcia Lowery, *Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN'S J. LEGAL COMMENT. 447, 452 (2000) (discussing the unaccountability of child welfare systems generally and the fact that insiders who perceive problems are powerless to do anything).

88. See Adam Avrushin, Address at the American Political Science Association Annual Meeting in Washington, DC: Policies, Money, and the Child Welfare Caseworker: What's Guiding Best Interest Decision-Making? 21-22 (2010) (discussing interviews with Illinois case workers and concluding that "agencies knowingly place children in homes where the home is inappropriate for addressing children's[s] needs. Foster parents may not have the financial resources to provide for a child's long-term needs, they may not have the parenting ability, or they may have ulterior motives for fostering."); STATE OF MICH., DEP'T OF HUMAN SERVS., CHILD FATALITY REVIEWS: 4/1/05 TO 3/31/08, QUALITY ASSURANCE REPORT 6, available at [http://www.michigan.gov/documents/dhs/QA\\_Report\\_of\\_Fatality\\_Reviews\\_-\\_April\\_05-March\\_08\\_315388\\_7.pdf](http://www.michigan.gov/documents/dhs/QA_Report_of_Fatality_Reviews_-_April_05-March_08_315388_7.pdf) (noting that child protective services workers failed to notify licensing department of complaints about foster homes).

89. See, e.g., Evans, *supra* note 1 (noting that DCS had met with the Colemans a few weeks prior to Destiny's death to address licensing violations).

90. IND. CODE § 31-34-10-3 (2011). A guardian ad litem is defined as:

[A]n attorney, a volunteer, or an employee of a county program . . . appointed by a court to: (1) represent and protect the best interests of a child; and (2) provide the child with services requested by the court, including: (A) researching; (B) examining; (C) advocating; (D) facilitating; and (E) monitoring the child's situation.

*Id.* § 31-9-2-50.

91. Leslie Rogers Dunn & Lilia Judson, *New Law Requires a GAL/CASA for Every Child in Every CHINS Case*, 14 IND. CT. TIMES 9 (2005) (on file with author). The appointment of a GAL



caregivers, court appointed special advocates are in a unique position to determine whether a foster parent should retain his or her license.<sup>92</sup> Recommendations for revocation can be communicated to the courts through the reports that court appointed special advocates submit on a regular basis.<sup>93</sup> Unfortunately, over 4000 children in state custody remain on a waiting list for a court appointed special advocate.<sup>94</sup> The probable reason for the waitlist is that most child advocates are unpaid volunteers.<sup>95</sup>

Although having a child advocate on every abuse and neglect case may improve outcomes for individual children,<sup>96</sup> reducing the waitlist for children in need of advocates does no more to improve the quality of care in licensed foster homes than hiring additional case managers. Child advocates visit children in their foster homes about as frequently as DCS case managers, who see the children on their caseloads every thirty days.<sup>97</sup> However, because their primary role is to make written recommendations to the judge based on the best interests of the children on their caseloads,<sup>98</sup> they have even less authority to influence licensing decisions than DCS case managers. A child advocate could recommend to a child's caseworker that the child be removed from a foster home, but the advocate's supervisor and DCS would have to concur before DCS would make any change in the child's placement.<sup>99</sup> Otherwise, an advocate's only recourse

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or CASA to all abuse and neglect cases is a condition precedent to receiving federal funds for child abuse and neglect prevention and treatment programs. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2006).

92. See *Volunteer Commitment Top Ten List*, COURT APPOINTED SPECIAL ADVOCATES, <http://www.nationalcasa.org/volunteer/10list.html> (last visited Mar. 11, 2011).

93. See *id.* (listing duties of a CASA volunteer, including compiling written reports and making recommendations).

94. Rebecca Berfanger, *Helping Children: More Cases, More Volunteers for GAL/CASA*, IND. LAW., Apr. 15, 2009 (on file with author).

95. See *About Us*, COURT APPOINTED SPECIAL ADVOCATES, [http://www.nationalcasa.org/about\\_us/index.html](http://www.nationalcasa.org/about_us/index.html) (last visited Mar. 11, 2011). The waitlist is essentially the result of an unfunded mandate that a court appointed special advocate be assigned to every abuse or neglect case. See Berfanger, *supra* note 94; see also *Ind. Gov't.—Improving the Child Welfare System*, IND. L. BLOG (June 21, 2009), [http://indianalawblog.com/archives/2009/06/ind\\_govt\\_improv.html](http://indianalawblog.com/archives/2009/06/ind_govt_improv.html) (discussing an *Indianapolis Star* column advocating for the full funding of state GAL/CASA programs).

96. See *Evidence of Effectiveness*, COURT APPOINTED SPECIAL ADVOCATES, [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5332511/k.7D2A/Evidence\\_of\\_Effectiveness.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5332511/k.7D2A/Evidence_of_Effectiveness.htm) (last visited Mar. 11, 2011) (listing reported statistical evidence that having a CASA on a case improves outcomes for children).

97. See *CHILD ADVOCATES, GUARDIAN AD LITEM/CASA—BEST PRACTICES* (on file with author) (stating that CASAs should visit the children on their caseload at least once every sixty days).

98. See *Volunteer Commitment Top Ten List*, *supra* note 92 (listing duties of a CASA volunteer, which include compiling written reports and making recommendations).

99. E-mail from Renee Fishel, Guardian ad Litem, Child Advocates, Inc., to author (Jan. 5, 2010) (on file with author).

would be to seek a court order for a new placement.<sup>100</sup> Licensing issues in Indiana's foster homes are therefore not substantially affected by the court appointed special advocates program.

### C. *The Third-Party Ombudsman*

The most recent change in Indiana's child welfare system came in the 2009 special legislative session, when Indiana lawmakers created an independent third-party ombudsman to oversee DCS.<sup>101</sup> With this legislation, Indiana joined at least thirty other states in providing for independent review of its foster care system.<sup>102</sup> The ombudsman has the authority to "receive, investigate, and attempt to resolve a complaint alleging that [DCS] . . . failed to protect the physical or mental health or safety of any child or failed to follow specific laws, rules, or written policies."<sup>103</sup> This individual may also recommend changes in policies and procedures to increase the effectiveness of the child welfare system.<sup>104</sup>

The creation of an independent ombudsman should be a laudable accomplishment, but it instead appears to be a largely symbolic appointment. The legislature only awarded \$145,000 in funds rather than the requested \$450,000 for 2009.<sup>105</sup> Nearly two-thirds of the allotted funding is for the ombudsman's salary.<sup>106</sup> Without adequate funding, it is unlikely that the ombudsman will be more than a placeholder, and it is even more unlikely that meaningful recommendations for foster care reform will accrue from the ombudsman's investigations. Lack of manpower is also a serious problem. The DCS ombudsman is the epitome of a one-man show, operating with no staff.<sup>107</sup> Indiana's situation contrasts sharply with programs in Michigan and Washington, where the ombudsman is supported by eleven and eight staff members, respectively.<sup>108</sup> Child welfare workers also fear that the legislature's failure to provide a comprehensive mission statement for the ombudsman weakens the legislation.<sup>109</sup> Cynthia Booth, Executive Director of Child Advocates, Inc., the

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100. *Id.*

101. H.E.A. 1001, 116th Gen. Assemb., 1st Spec. Sess. (Ind. 2009) (codified at IND. CODE § 4-13-19) (2011) (creating the Department of Child Services ombudsman).

102. Tim Evans, *Deaths of Kids Raise Oversight Questions*, INDIANAPOLIS STAR, Feb. 18, 2008, at A1.

103. IND. CODE § 4-13-195(a).

104. *Id.* § 4-13-195(b)(2), (6).

105. Tim Evans, *DCS Gets Ombudsman, but Doubts Remain*, INDIANAPOLIS STAR, July 7, 2009, at A1.

106. Evans, *supra* note 14, at A25 (noting that \$90,000 of the \$145,000 appropriated is for the ombudsman's salary).

107. *Id.*

108. *Id.* The Annie E. Casey Foundation 2009 Kids Count Data Book ranked Michigan 27th in overall child welfare and ranked Washington 14th. ANNIE E. CASEY FOUND., *supra* note 17, at 41.

109. *Id.*



organization that runs Marion County's court appointed special advocates program, remarked, "[T]he goal of systemic improvement through monitoring and investigating issues in our child welfare system by our ombudsman is certainly hindered by the lack of resources and vision."<sup>110</sup>

Given the legislation's lack of funding, manpower, and direction, it is unlikely that the ombudsman will address the issue of foster care licensing. It is important to have an independent agency review complaints and incidents of abuse and neglect at the hands of foster parents *ex post*, but the legislation does not directly address the need for changes in *ex ante* licensing procedures.<sup>111</sup> The safety of children in state custody is too important, and the theoretical ability of the ombudsman to address licensing issues too tenuous, to adopt a "wait and see" approach. Foster care licensing reform should be confronted directly rather than indirectly through the DCS ombudsman.

### III. LICENSING SCHEMES OF NEW HAMPSHIRE AND MINNESOTA

New Hampshire and Minnesota ranked first and second, respectively, in the 2009 Annie E. Casey Foundation report on child well-being.<sup>112</sup> The same report ranked Indiana thirty-first for overall child well-being.<sup>113</sup> Comparing the foster care licensing regime used in Indiana to the ones used in these high-ranking states yields proposals for changes to Indiana law that will better protect children placed in foster homes.

New Hampshire's foster care system is very small compared to Indiana's. As of October 1, 2009, New Hampshire had 959 licensed foster homes<sup>114</sup> and only 723 children in foster care.<sup>115</sup> Approximately 100 family service workers oversee

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110. *A Message from Executive Director Cindy Booth*, NEWS AND INFORMATION FROM CHILD ADVOCATES (Child Advocates, Inc., Indianapolis, Ind.), Jan. 1, 2010, <http://view.exacttarget.com/?j=fe631570746c0c787616&m=fe81176746c07&ls=fd01673706c057a7c177975&l=fe9815717c65047873&s=fe2317707c610d7b761677&jb=ffcf14&ju=fe5b1c77766300787415>.

111. Instead, the legislation merely grants the ombudsman the power to "[r]ecommend changes in procedures for investigating reports of abuse and neglect and overseeing the welfare of children who are under the jurisdiction of a juvenile court." IND. CODE § 4-13-19(5)(b)(4) (2011). This broad language, although arguably encompassing foster care licensing procedures, does not explicitly direct the attention of the ombudsman to the need for licensing reform.

112. ANNIE E. CASEY FOUND., *supra* note 17, at 41.

113. *Id.*

114. E-mail from Ann Abram, Foster Care Worker At-Large, N.H. Dep't of Health & Human Servs., Foster Care Unit, to Misty Richard, Research Analyst, N.H. Div. of Children, Youth & Families (Nov. 2, 2009) (on file with author). Specifically, New Hampshire has 659 homes licensed directly by the Division of Children, Youth and Families and 300 homes licensed by licensed child placing agencies. *Id.*

115. *Id.* Note that there are more foster homes in New Hampshire than there are foster children, creating a situation where foster parents "compete" for the placement of young children in their homes. Telephone Interview with Ann Abram, Foster Care Worker At-Large, N.H. Dep't of Health & Human Servs., Foster Care Unit (Oct. 6, 2009). This is in stark contrast to Indiana's

New Hampshire's foster children.<sup>116</sup> Family service workers are divided into assessment workers (those who respond immediately when there is a call for abuse or neglect) and ongoing workers (those who work on reunification and permanency plans).<sup>117</sup> Although the average caseload for a family service worker is about seventeen cases per worker,<sup>118</sup> assessment workers handle between thirty and forty cases at a time, while ongoing workers handle approximately fifteen cases at once.<sup>119</sup>

Minnesota's foster care system, with about 4000 licensed foster care providers as of December 2008, is similar in size to, but still smaller than, Indiana's system.<sup>120</sup> At the end of 2008, Minnesota had 6729 children in foster care.<sup>121</sup> Minnesota does not maintain statewide statistics of workers' average caseloads.<sup>122</sup>

#### *A. Initial Foster Home Licensure*

Both New Hampshire and Minnesota comply with federal law in terms of conducting national fingerprint-based criminal history checks and central registry checks on all applicants and adults residing in homes to be licensed.<sup>123</sup>

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situation, where there is less than one foster home available for every foster child. IND. DEP'T OF CHILD SERVS., *supra* note 21. The ratio of available homes to foster children need not be one to one, as many children come into foster care as a sibling group and are kept together in one foster home, and foster parents can care for multiple children at one time. *See* CHILD WELFARE MANUAL, *supra* note 37, CH. 8, § 1 (requiring siblings to be placed together whenever possible, unless a compelling reason exists why doing so would not be in the best interest of the children). Accordingly, child services agencies often look to the number of available beds rather than the number of homes. *See* Email from Regina C. Ashley, Deputy Gen. Counsel, Ind. Dep't of Child Servs., to author (Oct. 15, 2010) (on file with author).

116. E-mail from Misty Richard, Research Analyst, N.H. Div. of Children, Youth & Families, to Ann Abram, Foster Care Worker At-Large, N.H. Dep't Health & Human Servs., Foster Care Unit (Nov. 4, 2009) (on file with author). The figure is as of September 30, 2009. *Id.*

117. Telephone Interview with Ann Abram, *supra* note 115.

118. E-mail from Misty Richard to Ann Abram, *supra* note 116.

119. Telephone Interview with Ann Abram, *supra* note 115. Note that New Hampshire's caseload averages are higher than those reported in Indiana. *See supra* note 24 and accompanying text.

120. MINN. DEP'T OF HUMAN SERVS., LICENSING HUMAN SERVICES PROVIDERS PROTECTS HEALTH, SAFETY, RIGHTS (2008), <http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-4743-ENG>.

121. MINN. DEP'T OF HUMAN SERVS., MINNESOTA'S CHILD WELFARE REPORT 2008, at 11 (2008), <http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5408A-ENG>.

122. Telephone Interview with Mary Larson, Family Sys. Licenser, Minn. Dep't of Human Servs. (Oct. 14, 2009). Instead, each county operates as an independent unit. *Id.*

123. MINN. STAT. ANN. § 245C.03(1)(a)(1)-(2) (West, Westlaw through 2011 Reg. Sess.); N.H. REV. STAT. ANN. § 170-E:29(II-a) (2002). New Hampshire considers an adult, for purposes of this statute, a person seventeen years of age or older. N.H. CODE ADMIN. R. ANN. He-C 6446.06(a) (2010). Minnesota considers an adult a person thirteen years of age or older. MINN.



Minnesota's background check statute goes even further, requiring investigation of information from juvenile courts, the Bureau of Criminal Apprehension, records regarding substantiated perpetrators of vulnerable adults, and records regarding maltreatment of minors.<sup>124</sup>

In New Hampshire, the Division of Children, Youth and Families (DCYF) must deny an application if the applicant has a criminal conviction for a "violent or sexually-related crime against a child, or of a crime which shows that the person might be reasonably expected to pose a threat to a child, such as a violent crime for a sexually-related crime against an adult."<sup>125</sup> A license can later be granted to such an individual if DCYF approves a corrective action plan.<sup>126</sup> In Minnesota, an applicant is disqualified from licensure for fifteen years after the sentence has been discharged if he has been convicted of, admitted to, or given an *Alford* plea<sup>127</sup> to certain enumerated felony-level crimes.<sup>128</sup> The disqualification period is shortened to ten years for certain gross misdemeanors and seven years for other misdemeanors.<sup>129</sup>

Unless special circumstances exist, such as the need to place siblings together, a licensed foster home in New Hampshire cannot have more than six children under the age of twenty-one living in the home at any time, including children related to the foster parent.<sup>130</sup> In Minnesota, the maximum is eight children, including the foster parent's own children.<sup>131</sup> However, in Minnesota, no more than six foster children can be in the home at one time,<sup>132</sup> and no more than three children can be under the age of two.<sup>133</sup> The foster parent must also maintain at all times a ratio of one adult to every five children in the home.<sup>134</sup> Like in New Hampshire, these numbers may be altered to allow siblings to be placed in the same foster home.<sup>135</sup> Minnesota also allows exceptions for a child previously placed in a foster home to be placed in the same home again, or to

STAT. ANN. § 245C.03(1)(a)(2).

124. MINN. STAT. ANN. § 245C.08(1)(a).

125. N.H. REV. STAT. ANN. § 170-E:29(III).

126. *Id.*

127. "*Alford* plea" is the term given to the situation where a defendant enters a guilty plea for an offense while simultaneously maintaining his or her innocence. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

128. MINN. STAT. ANN. § 245C.14(1)(a)-15. The enumerated crimes include murder, manslaughter, assault, child abuse or neglect, kidnapping, criminal sexual conduct, indecent exposure, and other similar crimes. *Id.* § 245C.15(1)(a).

129. *Id.* § 245C.15(3)-(4). Other grounds for denial of a license include deficiencies in the physical home that could endanger the health and safety of children and failure to pass a fire inspection. MINN. R. 2960.3020(11) (West 2010).

130. N.H. REV. STAT. ANN. § 170-E:25(II)(a)(1).

131. MINN. R. 2960.3030(1).

132. *Id.*

133. *Id.* at 2960.3030(2)(A).

134. *Id.* at 2960.3030(1).

135. *Id.* at 2960.3030(3)(A).

avoid placing a child far away from his or her community.<sup>136</sup>

In both Minnesota and New Hampshire, licensing authorities conduct investigations of the home and persons responsible for the care of the children.<sup>137</sup> In New Hampshire, an applicant must demonstrate, among other competencies, knowledge of proper disciplinary procedures and of statutory requirements pertaining to food, clothing, and shelter.<sup>138</sup> Minnesota applicants must demonstrate that they can provide constructive discipline, support for the child's cultural background, and a network of family and friends.<sup>139</sup> Additionally, applicants in both states must pass a home inspection, including a fire inspection.<sup>140</sup> In New Hampshire, applicants must meet with licensing authorities at least twice before receiving a license.<sup>141</sup> In Minnesota, potential licensees must meet with licensors at least once.<sup>142</sup> Licensees in New Hampshire must notify licensing authorities before moving, marrying or divorcing, bringing another child into the home, or making structural changes to the home.<sup>143</sup> In Minnesota, licensees must get approval prior to "making any changes that would alter the license information."<sup>144</sup> In New Hampshire, applicants must complete twenty-one hours of training before becoming licensed.<sup>145</sup> Thereafter, the licensee must complete sixteen hours of in-service training every two years.<sup>146</sup> Minnesota requires six hours of pre-license training and twelve hours of annual in-service training.<sup>147</sup>

Notably, prior to licensure, Minnesota requires foster families to have a minimum of one hour of training in each of two areas: sudden infant death syndrome<sup>148</sup> and car seat use and installation.<sup>149</sup> These two hours of training must be renewed every five years.<sup>150</sup> Licensees are statutorily required to place infants to sleep on their backs with no pillows, comforters, or other soft toys in the crib.<sup>151</sup> Further, licensees must check at least once annually to ensure that any

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136. *Id.*

137. MINN. R. 2960.3050(1); N.H. REV. STAT. ANN. § 170-E:30 (2002).

138. N.H. CODE ADMIN. R. ANN. He-C 6446.03(f) (2010).

139. MINN. R. 2960.3060(4).

140. *Id.* at 2960.3040; N.H. CODE ADMIN. R. ANN. He-C 6446.08.

141. N.H. CODE ADMIN. R. ANN. He-C 6446.09-.10.

142. MINN. R. 2960.3060(4).

143. N.H. CODE ADMIN. R. ANN. He-C 6446.24(a).

144. MINN. STAT. ANN. § 245A.04(7)(d) (West, Westlaw through 2011 Reg. Sess.). Pertinent changes would include a change of residence or last name (e.g., because of marriage), as well as bringing another child into the home. *See id.*

145. N.H. CODE ADMIN. R. ANN. He-C 6446.11(b)(1).

146. *Id.* at He-C 6446.19(a).

147. MINN. R. 2960.3070(1)-(2).

148. MINN. STAT. ANN. § 245A.144.

149. *Id.* § 245A.18(2).

150. *Id.* § 245A.144(b) (sudden infant death syndrome training); *id.* § 245A.18(2)(c) (car seat training).

151. *Id.* § 245A.1435.



cribs used are not listed as unsafe on the United States Consumer Product Safety Commission's website.<sup>152</sup> Licensees must also complete a comprehensive crib examination on a monthly basis.<sup>153</sup> Minnesota licensing agencies require annual documentation of compliance with these measures.<sup>154</sup> Failure to comply with these requirements subjects a licensee to a range of disciplinary actions (issuance of a correction order, imposition of fines or an injunction, suspension of license, or revocation).<sup>155</sup>

New Hampshire does not allow waivers for any of the statutory requirements for foster care licenses.<sup>156</sup> However, waivers can be obtained for the administrative regulations that flesh out the statutory requirements.<sup>157</sup> Minnesota allows variances for rules that do not relate to the health and safety of the child as long as the licensee proposes and the department accepts an equivalent alternative.<sup>158</sup> Once granted, a foster care license is valid for two years in New Hampshire.<sup>159</sup> In Minnesota, the initial license is valid for one year, and each renewal is valid for two years.<sup>160</sup>

### *B. Foster Home Monitoring and License Revocation*

This section first discusses how New Hampshire and Minnesota evaluate a licensee's continued compliance with licensing regulations. Next, it lays out the various reasons why authorities may revoke a foster caretaker's license. Finally, it details the administrative procedures that licensing authorities must follow when revocation proceedings are initiated.

#### *1. Ongoing Monitoring and Reasons for Revocation.*—In both New

152. *Id.* § 245A.146(3)(a).

153. *Id.* § 245A.146(4).

154. *Id.* § 245A.146(5).

155. *See id.* §§ 245A.06-.07.

156. N.H. CODE ADMIN. R. ANN. He-C 6446.26(b) (2010).

157. *Id.* at He-C 6446.26(a).

158. MINN. STAT. ANN. § 245A.04(9); *see also* MINN. R. 2960.3020(9) (West 2010) (laying out the process for requesting variances).

159. N.H. REV. STAT. ANN. § 170-E:31(I) (2002).

160. MINN. STAT. ANN. § 245A.04(7)(b). Although the statute actually states that "[t]he commissioner may issue an initial license for a period not to exceed two years," in practice, an initial license is granted for one year, and at renewal, the license validity period is increased to two years. Telephone Interview with Mary Larson, *supra* note 122. In a monthly licensing memo from July 2008 that was sent to all county and private licensing agencies, the Minnesota licensing department stated:

Initial licenses for all family systems programs including . . . child foster care . . . should be issued for a one-year time period. This one year license provides opportunity to meet with the provider in a relatively short period of time in their first year of licensure to verify that licensing requirements are being met and so that support can be provided.

E-mail from Mary Larson, Family Sys. Licensor, Minn. Dep't of Human Servs., to author (Oct. 14, 2009) (on file with author).

Hampshire and Minnesota, the licensee must pass an evaluation at least once annually.<sup>161</sup> Foster parents in both states are prohibited from using certain forms of discipline on children in their care, including any form of corporal punishment; depriving a child of food, water, or other basic needs; punishment of any sort for bed-wetting or other toilet training lapses; and requiring a child to perform dangerous or difficult work as a form of punishment.<sup>162</sup> In New Hampshire, DCYF may revoke a license if the licensee neglects or abuses children; violates any rule or regulation pertaining to licensing; makes false statements to DCYF; refuses to: (i) cooperate with investigations, (ii) admit authorized persons into the home, or (iii) allow authorized persons to view their license; fails to maintain the home in a sanitary and safe manner; fails to comply with an approved corrective action plan; or fails to acquire and use adequate monies for proper care of the children.<sup>163</sup>

New Hampshire's administrative regulations require DCYF to issue a compliance order for any violation of licensing requirements that is not "related to the health, safety, or well being of the child in care."<sup>164</sup> If the violation is not cured within sixty days, DCYF may revoke the license.<sup>165</sup> If the violation does relate to the health, safety, or well-being of the child, DCYF must remove the children immediately.<sup>166</sup> If the licensee is convicted of certain enumerated felonies, DCYF must revoke the foster care license, and may revoke the license if DCYF substantiates a report of abuse or neglect against a foster parent.<sup>167</sup> The enumerated felonies include child abuse or neglect, spousal abuse, crimes against children, child pornography, rape, sexual assault, homicide, physical assault, battery, drug-related offenses, and violent or sexually-related crimes against children.<sup>168</sup> Minnesota provides for a variety of sanctions ranging from issuing a corrective order (similar to an order to comply issued in New Hampshire) to fines to revocation.<sup>169</sup> For each substantiated complaint of maltreatment of a child in Minnesota, the licensee is fined \$1000.<sup>170</sup> For violations of licensing rules that pertain to the health, safety, or supervision of children, the fine for each violation is \$200.<sup>171</sup> For all other violations, licensees are fined \$100 for each occurrence.<sup>172</sup>

2. *The Revocation Process.*—In order for a license to be revoked in New Hampshire, DCYF must first notify the licensee in writing with reasons for the

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161. N.H. REV. STAT. ANN. § 170-E:31(IV); MINN. R. 2960.3100(1)(G).

162. MINN. R. 2960.3080(8); N.H. CODE ADMIN. R. ANN. He-C 6446.21(b).

163. N.H. REV. STAT. ANN. § 170-E:35; *see also* N.H. CODE ADMIN. R. ANN. He-C 6446.27.

164. N.H. CODE ADMIN. R. ANN. He-C 6446.25(a).

165. *Id.* at He-C 6446.25(b).

166. *Id.* at He-C 6446.25(e).

167. *Id.* at He-C 6446.25(f), (g).

168. *Id.* at He-C 6446.27(b)(1)-(3).

169. MINN. STAT. ANN. § 245A.07(1)(a) (West, Westlaw through 2011 Reg. Sess.).

170. *Id.* § 245A.07(3)(c)(4).

171. *Id.*

172. *Id.*



determination.<sup>173</sup> The licensee is given ten days to appeal through an administrative hearing.<sup>174</sup> The administrative hearings must comport with New Hampshire's Administrative Procedure Act,<sup>175</sup> and the final decision of DCYF is subject to judicial review.<sup>176</sup> New Hampshire law includes a provision allowing for the immediate closure of a foster home in certain instances:

When the department decides to suspend, revoke, deny, or refuse to renew a license or permit, and it expressly finds that the continued operation of a child care facility or child-placing agency violates any minimum standard prescribed by law or rule, or otherwise jeopardizes the health, safety, morals, well-being or welfare of children served by the facility or child-placing agency, *the department shall include in its notice an order of closure directing that the operation of the facility or child-placing agency terminate immediately. In this event, the facility or child-placing agency shall not operate during the pendency of any proceeding for the review of the decision of the department, except under court order.*<sup>177</sup>

In Minnesota, if a violation "pose[s] an imminent risk of harm to the health, safety, or rights of persons served," the commissioner must immediately temporarily suspend the license.<sup>178</sup> The licensing agency must notify the licensee in writing of the reasons for the immediate suspension.<sup>179</sup> The licensee can then request an expedited hearing before an administrative law judge.<sup>180</sup> As in New Hampshire, the final decision is subject to judicial review.<sup>181</sup>

#### IV. LEARNING FROM WHAT WORKS IN NEW HAMPSHIRE AND MINNESOTA

As the preceding discussion indicates, Indiana's foster care licensing system parallels that of both New Hampshire and Minnesota in many respects. Generally speaking, each state has statutes, administrative rules, and policies that address the fitness of applicants for licensure in terms of criminal history and ability to provide for the safety and welfare of children in their care.<sup>182</sup> Similarly, all three states have a system for addressing complaints regarding deficiencies in a

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173. N.H. REV. STAT. ANN. § 170-E:36(I) (2002).

174. *Id.*

175. *Id.* § 170-E:36(II).

176. *Id.* § 170-E:37.

177. *Id.* § 170-E:36(III) (emphasis added).

178. MINN. STAT. ANN. § 245A.07(2) (West, Westlaw through 2011 Reg. Sess.).

179. *Id.*

180. *Id.*

181. *Id.* § 245A.08(5).

182. See IND. CODE § 31-27-4-5 (2011); MINN. STAT. ANN. §§ 245C.03(1), 245C.08(1)(a); N.H. REV. STAT. ANN. § 170-E:29(II-a); 465 IND. ADMIN. CODE 2-1-3 (2011); MINN. R. 2960.3050(1) (West 2010); N.H. CODE ADMIN. R. He-C 6446.03 (2010); see also discussion *supra* Parts I.A, III.A.

licensee's ability to care for children, with license revocation as the most severe penalty.<sup>183</sup> Finally, each state sets out administrative procedures to be followed in the event that revocation proceedings are initiated.<sup>184</sup> These similarities seem to indicate that Indiana has the tools necessary to achieve better outcomes for child welfare, which in turn indicates that the problem may lie with monitoring and enforcing of existing laws, policies, and procedures. However, New Hampshire and Minnesota also have statutory laws and administrative rules that are more effective at safeguarding children than what is available in Indiana. Such rules could be incorporated into Indiana's regime in order to strengthen the tools available to foster care licensing authorities. This Part explores foster care licensing provisions from New Hampshire and Minnesota that could be adopted in Indiana. Moreover, it suggests that lax monitoring and enforcement may account for the deficiencies in outcomes for children in Indiana, given that the laws of Indiana, Minnesota, and New Hampshire are similar in many respects.

### *A. Areas in Need of Improvement*

There are several areas where Indiana could incorporate statutory law or administrative rules from Minnesota or New Hampshire into its foster care licensing system. Specifically, Indiana can improve its licensing regime by restricting the use of waivers, requiring temporary suspension or revocation of a license when a licensee commits certain violations, mandating the content of training, and placing limits on the time frame for which a license is valid.

1. *Waivers.*—Statutory law in Indiana currently allows an applicant to receive a waiver for any foster care licensing requirement<sup>185</sup> as long as the applicant complies with the procedural requirements for waivers and granting the waiver does not adversely affect child health, safety, or welfare.<sup>186</sup> The determination of whether waiving a given license requirement would adversely affect child health or welfare is left to DCS's discretion.<sup>187</sup> DCS's internal policy is to only grant waivers for administrative rules and regulations, not statutory licensing requirements.<sup>188</sup> Yet Indiana Code section 31-27-4-12 allows waivers for both administrative rules and regulations and statutory requirements.<sup>189</sup>

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183. See IND. CODE §§ 31-27-4-32, 33; MINN. STAT. ANN. § 245A.07; N.H. REV. STAT. ANN. § 170-E:35; N.H. CODE ADMIN. R. ANN. He-C 6446.27(c), (d); see also discussion *supra* Parts I.B, III.B.

184. See IND. CODE §§ 31-27-4-22 to -25; MINN. STAT. ANN. §§ 245A.07-.08; N.H. REV. STAT. ANN. §§ 170-E:36, 37; see also discussion *supra* Parts I.B.2, III.B.2.

185. IND. CODE § 31-27-4-12.

186. *Id.* § 31-27-2-8(d)(4).

187. *Id.* § 31-27-2-8(d).

188. See CHILD WELFARE MANUAL, *supra* note 37, CH. 12, § 19. For example, DCS could grant a waiver of the administrative regulation requiring that each foster child have his or her own bed, but it would not grant a waiver requesting that a person residing in the home to be licensed be exempted from the statutory background check requirements.

189. See IND. CODE § 31-27-4-12 ("A foster family home may be eligible to receive a waiver



The purpose of the waiver program is to allow foster care applicants who are otherwise unable to comply with all licensing requirements to become licensed.<sup>190</sup> For example, DCS could grant a waiver to a foster care license applicant who has a felony conviction from several decades prior to the date of his application if DCS determines that the prior conviction does not pose a threat to the health or safety of children.<sup>191</sup> Because the ratio of licensed foster homes to children in need of placement is less than one to one,<sup>192</sup> licensing authorities may be pressured to grant waivers in order to avoid a shortage of available homes.<sup>193</sup> A policy that purportedly only allows waivers for licensing requirements that do not affect the health and safety of children, yet in practice allows convicted felons to become licensed foster parents, is contradictory and potentially extremely dangerous.

Minnesota does not allow waivers at all.<sup>194</sup> New Hampshire prohibits the issuance of waivers for any statutory provision pertaining to foster care licensing but permits waivers for licensing rules imposed by DCYF.<sup>195</sup> Indiana also purportedly prohibits waivers for statutory licensing requirements, but this policy conflicts with the plain language of the statute.<sup>196</sup> The contradictory situation posed by the discrepancy between Indiana's waiver policy and practice could be remedied by adopting a statutory provision similar to New Hampshire's, prohibiting the issuance of waivers that would exempt an applicant from

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. . . *from the requirements of this chapter* by complying with IC 31-27-2-8.” (emphasis added)). Indiana Code section 31-27-2-8 states that DCS may “grant . . . a waiver of a rule . . . .” However the word “rule” is not defined. DCS has interpreted “rule” in this context to mean administrative regulations. See CHILD WELFARE MANUAL, *supra* note 37, CH. 12, § 19 (“Waivers shall be granted only for rules and regulations and not for Indiana statutory requirements.”).

190. Interview with Regina C. Ashley and Vonda Ramsey, *supra* note 4.

191. *Id.* Under Indiana Code section 31-27-4-13, DCS cannot license a foster parent who has been convicted of any of the felonies enumerated in the statute or any misdemeanor related to the health and safety of a child. Under DCS policy, however, anyone convicted of any felony, regardless of whether it is specifically enumerated in Indiana Code section 31-27-4-13, is disqualified from becoming a licensed foster parent. See CHILD WELFARE MANUAL, *supra* note 37, CH. 12, § 30. Because DCS has interpreted Indiana Code section 31-27-4-12 to mean that it cannot waive statutory requirements, DCS may issue a waiver allowing a person who has been convicted of a felony not listed in the statute to become licensed, but it cannot do so for an applicant convicted of a felony listed in the statute. *Id.*

192. See DCS PRACTICE INDICATOR REPORT, *supra* note 20; IND. DEP'T OF CHILD SERVS., *supra* note 21.

193. See Diane DePantilis & Heather Girvin, *Investigating Child Maltreatment in Out-of-Home Care: Barriers to Effective Decision-Making*, 27 CHILDREN & YOUTH SERVS. REV. 353, 367 (2005) (finding that maltreatment in out-of-home care in New Jersey is partially caused by “[p]ressure to unsubstantiate due to shortage of foster homes”).

194. See MINN. STAT. ANN. § 245A.04 (West, Westlaw through 2011 Reg. Sess.) (permitting variances but not addressing waivers).

195. N.H. CODE ADMIN. R. ANN. He-C 6446.26(a)-(b) (2010).

196. See *supra* note 190 and accompanying text.

compliance with the statutory rules for licensure. New Hampshire's provision is preferable to Minnesota's because it is more flexible. The shortage of available foster homes in Indiana<sup>197</sup> necessitates flexibility for DCS to make exceptions to licensing rules in situations where child safety is not an issue to ensure an adequate number of licensed homes. However, DCS should raise awareness of the need for foster families and stress the necessary requirements rather than grant waivers.<sup>198</sup> This practice will maintain a focus on child safety while allowing DCS to recruit needed foster families.

2. *License Suspension and Revocation.*—Variation is most apparent among Indiana, Minnesota, and New Hampshire laws in the area of revocation. Specifically, the amount of discretion licensing authorities have to revoke a license after receiving a complaint pertaining to the health and safety of a child in foster care differs among the three states.<sup>199</sup> Indiana law should require that a license be immediately temporarily suspended in cases where DCS is investigating potential violations that pose an immediate threat to the health or safety of children. Both Minnesota and New Hampshire permit the immediate temporary suspension or closure of a foster home in cases where license holders' actions pose a risk of imminent danger to children in their care.<sup>200</sup> These provisions allow licensing authorities to suspend or revoke a license during the pendency of an investigation into the complaint. Indiana has no such provision in its laws. Rather, Indiana statute specifically requires that license holders receive notice and an opportunity for a hearing prior to license revocation.<sup>201</sup> When DCS receives a complaint that a foster parent has abused or neglected a child in his or her care, a temporary suspension would preclude such person from maintaining his or her license until an investigation has been completed and procedures for notice and a hearing have been followed. In the case of Destiny Linden, the court appointed special advocate went to court in order to convince a judge that the children she was advocating for should be removed from the

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197. Mary McDermott, *Reporting on Foster Care*, JOURNALISM CTR. ON CHILDREN & FAMILIES (Sept. 11, 2006), <http://www.journalismcenter.org/resource/reporting-best-practices/reporting-foster-care> (discussing the vast shortage of available foster homes in Indiana).

198. See KATHY BARBELL & LISA SHEIKH, CHILD WELFARE LEAGUE OF AM., *A COMMUNITY OUTREACH HANDBOOK FOR RECRUITING FOSTER PARENTS AND VOLUNTEERS 1* (2000), available at <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/recruiting-foster-parents.pdf> (stating that community outreach efforts can inform the public about the need for foster families and increase the number of qualified families).

199. Compare IND. CODE § 31-27-4-33(b) (2011) (stating that the department "shall" revoke the license of a licensee convicted of certain enumerated felonies but "may" revoke the license for other violations), with MINN. STAT. ANN. § 245A.07(2) (mandating the immediate temporary suspension of a license if a violation pertains to the health or safety of children), and N.H. REV. STAT. ANN. § 170-E:36(III) (requiring immediate closure of a foster home when continued operation would jeopardize child health or safety).

200. See MINN. STAT. ANN. § 245A.07(2); N.H. REV. STAT. ANN. § 170-E:36(III).

201. IND. CODE § 31-27-5-33.



Colemans' care.<sup>202</sup> Had a temporary suspension provision been available to the licensing authorities, the Colemans' license could have been temporarily suspended while DCS investigated the child abuse complaints, abdicating the need to obtain a court order for the children's removal.<sup>203</sup> And it is likely that Destiny would still be alive today if a temporary suspension procedure had existed in Indiana at the time she was placed in foster care.

3. *Training*.—The third major area where Indiana can incorporate strengths from Minnesota and New Hampshire is in its foster parent training program. Although the quantity of required pre-license and ongoing training in Indiana parallels that of Minnesota and New Hampshire,<sup>204</sup> there are no prescribed guidelines in Indiana for what must be covered during training.<sup>205</sup> In contrast, New Hampshire regulations mandate seven areas of training, including discipline techniques and information on child development.<sup>206</sup> Minnesota regulations similarly provide a list of twenty-six suggested topics for in-service training<sup>207</sup> and mandate five competencies to be covered in pre-license training.<sup>208</sup> Pre-license training in Minnesota must include emergency preparedness, laws and regulations governing foster care, cultural diversity, licensing requirements, and the role of foster parents in the child welfare system.<sup>209</sup> Like New Hampshire and Minnesota, Indiana law should specify the areas of training that must be completed prior to licensure.<sup>210</sup> DCS currently uses a training curriculum

202. Evans, *supra* note 1.

203. During the pendency of the investigation, children placed in the home under investigation could be moved to another foster home. New Hampshire follows this practice. Telephone Interview with Ann Abram, *supra* note 115.

204. Recall that Indiana requires twenty hours of pre-license training and ten hours of ongoing training on an annual basis. 465 IND. ADMIN. CODE 2-1-16 (2011). New Hampshire requires twenty-one hours of pre-license training and sixteen hours of ongoing training biannually. N.H. CODE ADMIN. R. ANN. HE-C 6446.11(b), 6446.19(a) (2010). Minnesota requires only six hours of pre-license training, but the state requires twelve hours of ongoing training annually. MINN. R. 2960.3070 (West 2010).

205. Compare 465 IND. ADMIN. CODE 2-1-16 (mandating twenty hours of training but failing to specify what the training should entail), with N.H. CODE ADMIN. R. ANN. HE-C 6446.11(b), 6446.19(a), and MINN. R. 2960.3070 (listing the areas that must be covered during training).

206. Specifically, N.H. CODE ADMIN. R. ANN. HE-C 6446.11(b) provides that the pre-license training must include:

(a) An orientation to the foster care system; (b) A review of the laws and regulations pertaining to foster care; (c) The impact of trauma on child growth and development; (d) Understanding grief and loss; (e) Maintaining family connectedness; (f) The guidance and positive discipline of children; and (g) The impact of sexual abuse and maintaining a safe environment.

207. MINN. R. 2960.3070(2).

208. *Id.* at 2960.3070(1).

209. *Id.*

210. See Cheryl Buehler et al, The Potential for Successful Family Foster Care: Conceptualizing Competency Domains for Foster Parents (unpublished manuscript), available at

developed by the Institute for Human Services.<sup>211</sup> However, the competencies covered are not statutorily required and are subject to change.

One training area that should be statutorily mandated in Indiana is the prevention of sudden infant death syndrome. Minnesota requires at least one hour of training in sudden infant death syndrome.<sup>212</sup> The training includes a discussion of factors that are linked to shaken baby syndrome and sudden infant death syndrome and methods of prevention.<sup>213</sup> License applicants are also instructed to put babies to sleep on their backs.<sup>214</sup> The importance of sudden infant death syndrome training in Indiana is evidenced by the fact that DCS embarked on a "Safe Sleep" campaign in July 2009 in an effort to increase awareness about proper sleep placement and prevention of sudden infant death syndrome.<sup>215</sup> It is thus reasonable to require that potential foster parents in Indiana, like those in Minnesota, receive instructions on how to prevent sudden infant death syndrome.

Another area of training that should be statutorily mandated in Indiana is discipline. DCS currently has a policy that prohibits certain forms of discipline,<sup>216</sup> but neither statute nor regulation mandates that this policy be taught in training.<sup>217</sup> Given the incidence of maltreatment of children by foster parents in Indiana,<sup>218</sup> foster care training should specifically enumerate prohibited forms of discipline and require instruction in recommended disciplinary methods.<sup>219</sup>

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<http://searchde.org/hdf/facultystaff/Buehler/Succussful%20Family%20Foster%20Care%20CW%20In%20Press.pdf> (last visited Mar. 11, 2011) (arguing that specific competencies should be included in state foster care licensing regulations).

211. CHILD WELFARE MANUAL, *supra* note 37, CH. 12, § 5. The curriculum includes modules on teambuilding; the impact of abuse and neglect on child development; issues of attachment, separation, and placement; discipline; cultural issues in placement; primary families; sexual abuse; and effects of caregiving on the family. *Id.*

212. MINN. STAT. ANN. § 245A.144(b) (West, Westlaw through 2011 Reg. Sess.).

213. *Id.* § 245A.1435.

214. *Id.*

215. *See generally Safe Sleep*, IND. DEP'T OF CHILD SERVS, <http://www.in.gov/dcs/2869.htm> (last visited June 25, 2011).

216. CHILD WELFARE MANUAL, *supra* note 37, CH. 8, § 18.

217. Discipline training is, however, included in the foster parent training curriculum currently used by DCS. *See id.*, CH. 12, § 5.

218. DEMOGRAPHICS AND TRENDING REPORT, *supra* note 16, at 125 (stating that there were seventy-three cases of neglect, nineteen cases of physical abuse, and seven cases of sexual abuse perpetrated by licensed foster caregivers in 2008).

219. *See* Buehler et al., *supra* note 210, at 8 (noting that foster parents should "possess a variety of positive discipline strategies"); KRISTINE N. PIESCHER ET AL., CTR. FOR ADVANCED STUDIES IN CHILD WELFARE, EVIDENCE-BASED PRACTICE IN FOSTER PARENT TRAINING AND SUPPORT: IMPLICATIONS FOR TREATMENT FOSTER CARE PROVIDERS, at iv (2008), *available at* [http://www.ffa.org/research\\_outcomes/EBP\\_FP\\_Training\\_Support\\_Guide.pdf](http://www.ffa.org/research_outcomes/EBP_FP_Training_Support_Guide.pdf) (remarking that effective training of foster parents includes teaching disciplinary methods).



Specificity would be helpful in the area of feeding as well.<sup>220</sup> Janice Ellis, a DCS Foster Care Unit Supervisor, stated, “[DCS] do[es] not have a set curriculum regarding the principles of feeding children; however, the subject *may* come up in the pre-service training as a discussion point.”<sup>221</sup> Because the state leaves to foster parents the important task of preparing nutritionally sound and age-appropriate food for children in state custody, DCS should provide nutrition training to potential licensees. License applicants do not necessarily have knowledge, for example, of the appropriate age at which to start feeding a child solid food or the dangers of feeding young children fast food on a regular basis. Although the content of nutritional training changes as new research in child nutrition comes to light, some base level of training should be statutorily required.

### *B. The Need for Better Monitoring and Enforcement*

Regardless of whether Indiana substantively changes its foster care licensing rules and regulations, it is nonetheless vital that the existing laws be enforced and licensed homes be monitored regularly. Proper screening of foster care applicants is crucial to protect children from maltreatment while in foster care.<sup>222</sup> Accordingly, DCS should simply not issue waivers for licensing regulations that are intended to safeguard the health and welfare of children in state care. For example, the statutory requirement that license applicants demonstrate knowledge of proper feeding principles should not be overlooked. Furthermore, family case managers should report concerns to licensing authorities, who should not hesitate to revoke licenses when necessary.<sup>223</sup> Research suggests that licensing agencies’ failure to properly monitor foster parents after initial licensure is a contributing factor to the maltreatment of children in foster care.<sup>224</sup> When the state removes children from their homes, it commits to providing a safer placement for those children in foster care.<sup>225</sup> Given the state’s responsibilities to children removed

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220. E-mail from Janice Ellis, Foster Care Unit Supervisor, Ind. Dep’t of Child Servs., to author (Nov. 19, 2009) (on file with author) (emphasis added).

221. *Id.* Indiana law in this regard used to parallel New Hampshire, with a two-year validity period, but the period was increased by the legislature in 2006. *See* 2006 Ind. Legis. Serv. 145 (2006).

222. *See, e.g.,* Sharon Balmer, Comment, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 939 (2005) (detailing how child protective agencies put children in danger by “cutting corners” and insufficiently investigating homes prior to licensure); Adair Fox & Jill Duerr Berrick, *A Response to No One Ever Asked Us: A Review of Children’s Experiences in Out-of-Home Care*, 24 CHILD & ADOLES. SOC. WORK J. 23, 34 (2007) (explaining that a study of children’s views of foster care revealed that licensing authorities should screen foster caregivers more carefully to reduce the incidence of maltreatment in foster care).

223. For further discussion, see *supra* Part II.A.

224. Mushlin, *supra* note 15, at 210.

225. *See id.* at 204 (noting that the purpose of foster care is to provide a safe haven for children); *see also* Harper, *supra* note 19, at 795 (discussing how children are removed from their

from their homes, acquiescing in noncompliance with established policies and procedures is unacceptable. Improved enforcement will not require additional funding or manpower because DCS already has enforcement policies in place and a dedicated team of licensing authorities who oversee licensed foster homes.

In addition to emulating other states that fare better in child welfare rankings for substantive changes to child welfare laws, Indiana lawmakers should research internal controls and procedural policies used elsewhere and consider overhauling the chain of command and communication protocols. Communication breakdowns between internal departments of DCS, between DCS and court appointed special advocates, or between DCS and other service providers such as therapists, may contribute to the tragic deaths of children in foster care.<sup>226</sup> Discussing the death of Destiny Linden, the Indiana director of the guardian ad litem and court appointed special advocates programs stated, "The same issues come up over and over again . . . communication. The exchange of documents. Notification. Phone calls not being returned. I clearly think we can do better with conflict and communication."<sup>227</sup>

A comprehensive enforcement scheme requires the various departments within DCS (i.e., ongoing case managers and licensing authorities) to regularly communicate information regarding the status of foster parents and children in their care.<sup>228</sup> Such information also needs to be communicated to child advocates, home-based counselors, and other service providers involved in a child's case.<sup>229</sup> Assuming it is technologically feasible, it would seem prudent to implement a system whereby a foster parent who is the subject of a complaint can be "flagged" in DCS's computer system, alerting case managers to the issue.

The Indianapolis Metropolitan Police Department (IMPD) has a flagging system that is used to alert patrolmen when a family on their beat is involved with DCS.<sup>230</sup> The system was implemented at the end of 2007 after a child who was previously in foster care was beaten to death shortly after returning to her

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homes when a social service agency finds it unsafe to remain there).

226. See Evans, *supra* note 1 ("DCS officials blamed . . . [Destiny Linden's] death on communication breakdowns, errors in judgment and a lack of urgency."); see also John A. Byles, *Problems in Interagency Collaboration: Lessons from a Project that Failed*, 9 CHILD ABUSE & NEGLECT 549, 549 (1985) ("[I]nquests into child deaths from abuse have often attributed some blame to faulty communication and/or poor cooperation.").

227. Evans, *supra* note 1.

228. See Michael A. Nunno & Janet K. Motz, *The Development of an Effective Response to the Abuse of Children in Out-of-Home Care*, 12 CHILD ABUSE & NEGLECT 521, 526 (1988) ("The key . . . appears to be the development of clear written formal agreements . . . [between] licensing and child protective services administration.").

229. *Id.* ("The coordination and cooperation of all agencies involved in the care, treatment, and protection of children is essential in any state effort to protect children from harm in residential facilities.").

230. Tim Evans, *IMPD Officer Failed to Report Incidents to DCS*, INDIANAPOLIS STAR, Dec. 6, 2009, at A1, available at <http://www.indystar.com/apps/pbcs.dll/article?AID=/20091206/NEWS14/912060366/IMPD-failed-to-report-incidents-to-DCS&template=printart>.



biological family, while DCS was still involved in the case.<sup>231</sup> Unbeknownst to DCS, the police made a house call to the girl's home just days before she was beaten.<sup>232</sup> The simplicity of the system is striking:

[T]he addresses of families involved with DCS are submitted to the Marion County emergency dispatch system. When police are dispatched to one of those addresses, a notice on an officer's in-car computer alerts him or her to the DCS case. The officer is instructed to call the family's DCS caseworker.<sup>233</sup>

A similar flagging system could be used to improve interdepartmental communication within DCS. For example, DCS could flag a licensee in the computer system when it receives a complaint about a foster home. The computer system would then alert all family case managers who have children placed in the home. Such a system would prevent the twin problems of case managers not knowing that children on their caseload are placed in a potentially dangerous home and additional children being placed in a home that is the subject of a complaint.

#### CONCLUSION

Recent deaths of several children in state custody have raised public awareness of the magnitude of responsibility the state assumes when it removes children from their homes.<sup>234</sup> Legislative efforts in the past few years requiring that each child in the system have a court appointed special advocate,<sup>235</sup> increasing the number of family case managers,<sup>236</sup> and creating an independent third-party ombudsman<sup>237</sup> are steps in the right direction. However, the safety of children in state custody could be better addressed by focusing legislative efforts on those who provide day-to-day services to these children—foster parents. Indiana can strengthen its licensing regime by incorporating statutory provisions from New Hampshire and Minnesota in the areas of waivers, temporary suspension of licenses, training, and license validity periods.<sup>238</sup> Achieving the goal of safeguarding Indiana's children can be met in a cost-effective manner by properly enforcing existing policies and procedures.<sup>239</sup> A simple computer flagging system may improve communication among internal departments of

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231. *Id.*

232. *Id.*

233. *Id.*

234. *See* Evans, *supra* note 14 (noting that since September 2007, at least fifteen children have died in Indiana while involved in an active or recently closed DCS case).

235. IND. CODE § 31-34-10-3 (2011).

236. *About DCS*, *supra* note 78.

237. H.E.A. 1001, 116th Gen. Assemb., 1st Spec. Sess. (Ind. 2009) (codified at IND. CODE. § 4-13-19).

238. *See* discussion *supra* Part IV.A.

239. *See* discussion *supra* Part IV.B.

DCS as well as between DCS and its external service providers.<sup>240</sup> By adequately training licensees, implementing regulations that prevent inappropriate caretakers from receiving licenses, and removing noncompliant licensees from the system, Indiana can build a reliable network of foster parents who can provide for the best interests of children. Strengthening Indiana's foster care licensing regime will ensure that the tragedy of Destiny Linden's death is not repeated.

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240. Evans, *supra* note 14.





# NOT IN MY LIBRARY: AN EXAMINATION OF STATE AND LOCAL BANS OF SEX OFFENDERS FROM PUBLIC LIBRARIES

JENNIFER EKBLAW\*

## INTRODUCTION

“People who prey on our children are among the most dangerous criminals we face. They target our most precious and our most vulnerable citizens . . . .”<sup>1</sup> Presented with these risks, most individuals favor passage of additional sex offender restrictions in their communities. Hence, political leaders in Albuquerque, New Mexico,<sup>2</sup> New Bedford, Massachusetts,<sup>3</sup> Quincy, Massachusetts,<sup>4</sup> Methuen, Massachusetts,<sup>5</sup> Stephenville, Texas,<sup>6</sup> Rowan County, North Carolina,<sup>7</sup> and the State of Iowa<sup>8</sup> have attempted to protect children by prohibiting sex offenders from entering public libraries. However, these restrictions raise First Amendment issues.

The First Amendment provides, “Congress shall make no law . . . abridging the freedom of speech.”<sup>9</sup> Within the freedom of speech, the Supreme Court recognizes not only the right of speakers to distribute information, but also a corresponding right of others to receive information.<sup>10</sup> Subsequent Court decisions have recognized the right to receive information<sup>11</sup> and determined that this right includes a right of some level of public library access.<sup>12</sup> Therefore, sex

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1. Press Release, John Lynch, Governor of N.H., Governor Lynch Asks House Committee to Help Protect Children from Online Predators (Apr. 3, 2008), *available at* <http://www.governor.nh.gov/media/news/2008/040308.html>.

2. ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25: REGISTERED SEX OFFENDERS IN PUBLIC LIBRARIES (Sept. 16, 2008) (on file with author) [hereinafter ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25].

3. NEW BEDFORD, MASS., CODE §§ 17-26 to -27 (2008).

4. See Simon King, *Quincy Mayor Thomas Koch Signs Anti Sex Offender Law*, QUINCY COVE, Jan. 13, 2010 (on file with author).

5. METHUEN, MASS., MUN. CODE ch. 27 (2008).

6. STEPHENVILLE, TEX., CODE §§ 130.80-.86 (2007).

7. ROWAN CNTY., N.C., CODE § 15-3 (2008).

8. IOWA CODE ANN. § 692A.113 (West, Westlaw through May 19 of 2011 Reg. Sess.).

9. U.S. CONST. amend. I.

10. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

11. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

12. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).



offenders have a First Amendment right to access public libraries.<sup>13</sup>

Nonetheless, the right to receive information and the associated right to access public libraries are not absolute;<sup>14</sup> they must be balanced with the government's interest in protecting children.<sup>15</sup> Courts will uphold a restriction under the First Amendment if the restriction does not attempt to suppress a specific message, is reasonably tailored to serve a significant government interest, and leaves open alternative avenues of expression.<sup>16</sup> An examination of absolute bans of sex offenders from public libraries—embodied in state statutes, county and municipal ordinances, and municipal executive instructions—reveals that these restrictions are not sufficiently tailored and therefore violate the First Amendment.<sup>17</sup> Consequently, these bans should be repealed and replaced with less speech-restrictive safety precautions.<sup>18</sup>

Part I of this Note provides background on the regulation of sex offenders after completion of their criminal sentences. Part II introduces state statutes, county and city ordinances, and city executive instructions that prohibit sex offenders from entering public libraries. Part III outlines governments' and sex offenders' competing interests. Part IV explores First Amendment jurisprudence related to the right to access public libraries, which evolved from the right to receive information.<sup>19</sup> In addition, Part IV provides examples of acceptable and unacceptable restrictions on library access for all patrons as well as computer and Internet use by sex offenders. Part IV will also examine *Doe v. City of Albuquerque*,<sup>20</sup> a recent decision from the United States District Court for the District of New Mexico that struck down the initial Albuquerque ban as unconstitutional.<sup>21</sup> Part V recommends that courts strike down the remaining bans and adopt less speech-restrictive security alternatives.

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13. *See id.*

14. *See id.*

15. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982); Minutes of the Meeting of the Rowan Cnty. Bd. of Comm'rs 16 (Sept. 4, 2007) [hereinafter Rowan Cnty. Sept. 4, 2007 Minutes], available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (click "Minutes", then click "2000s", then click "2007", and open "cm 070904.pdf.") (justifying an ordinance banning sex offenders from public libraries because it would protect children).

16. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

17. *See infra* Parts IV.B.3, V.A.

18. *See infra* Part V.

19. *See Kreimer*, 958 F.2d at 1255.

20. No. 08-cv-01041-MCA-LFG (D.N.M. Mar. 31, 2010).

21. *Id.* at 42.

## I. BACKGROUND ON SEX OFFENDER REGULATION

### A. *Who Are Sex Offenders?*

Society generally views sex offenders as posing a greater risk than other criminals and believes many of them target children.<sup>22</sup> However, sex offenders include individuals of all ages and backgrounds, even individuals convicted of crimes lacking a sexual element.<sup>23</sup> When considering restrictions imposed on all sex offenders, one must remember that not everyone labeled “sex offender” is a depraved individual who presents continual risks to the public.<sup>24</sup>

Sex offenders that do exemplify this stereotype are sexually violent predators (SVPs), the most dangerous class of sex offenders who exhibit a “mental disease or defect” or “a behavioral abnormality.”<sup>25</sup> However, SVPs are not the subset of sex offenders in contact with society because most states commit SVPs to inpatient facilities.<sup>26</sup> Even in states such as Texas that provide outpatient treatment for SVPs, unattended children are unlikely to encounter these offenders because SVPs are prohibited from visiting public places children frequent.<sup>27</sup>

Although these dangerous SVPs are the individuals normally associated with the term “sex offenders,” they represent only a small subset of sex offenders.<sup>28</sup> The large, general class of sex offenders includes many subsets. One of these subsets includes child molesters.<sup>29</sup> Some child molesters abuse children out of convenience, but many child molesters are sexually attracted to children.<sup>30</sup> The cause and development of adults’ attraction to children remains unknown.<sup>31</sup>

In addition to SVPs and child molesters, there are other “sex offenders”<sup>32</sup> who are less likely to sexually abuse a child.<sup>33</sup> Under the Adam Walsh Child

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22. See JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 6-7 (2005).

23. See, e.g., 42 U.S.C. § 16911(7) (2006) (establishing kidnapping or false imprisonment by a non-parent as offenses requiring sex offender registration).

24. See *infra* text accompanying notes 32-40.

25. See Ronnie Hall, Note, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of “Sexually Violent Predators” in Texas*, 13 TEX. WESLEYAN L. REV. 175, 186 (2006).

26. See *id.*

27. See *id.* at 188 (citing one of the provisions SVPs must adhere to: “I will not go to schools, parks, swimming pools, movie theaters, public libraries, amusement parks, arcades or malls.”).

28. In 2002, only 2478 Americans were in SVP facilities. See LAFOND, *supra* note 22, at 144.

29. See R. BARRI FLOWERS, SEX CRIMES: PERPETRATORS, PREDATORS, PROSTITUTES, AND VICTIMS 239 (2d ed. 2006).

30. ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, & OTHER SEX OFFENDERS 69 (2003).

31. *Id.*

32. See 42 U.S.C. § 16911(7) (2006).

33. See NEV. REV. STAT. ANN. §§ 179D.113 to -.117 (West, Westlaw through 2010 26th



Protection and Safety Act,<sup>34</sup> all states must classify non-parents who kidnap or falsely imprison a minor as sex offenders, even if the crime was not sexually motivated.<sup>35</sup> Consequently, a grandmother convicted of “kidnapping” her grandchildren to protect them from abusive parents would have to register as a sex offender.<sup>36</sup> In many states, individuals who engage in consensual sexual relations with a minor must also register, even if the offender is barely past the age of majority.<sup>37</sup> Other offenders include teens who engage in “sexting.” Sexting occurs when an individual sends a nude photograph of oneself via text message.<sup>38</sup> Prosecutors may charge teenagers caught sending or receiving nude photographs with child pornography distribution or possession, respectively.<sup>39</sup> If convicted, these minors who sent photos of themselves must register as sex offenders for “abusing” themselves.<sup>40</sup>

This simultaneous labeling of children as offenders and victims indicates that the label “sex offender” has become too all-encompassing. Although sex abuse continues to be a problem, the government also needs to address this labeling issue. Legislation cannot appropriately regulate sex offenders when this group has few unifying qualities or common motivating factors.

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Spec. Sess.) (defining Tier I, II, and III offenders), *held unconstitutional* by *ACLU of Nev. v. Cortez Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008); R. Karl Hanson, *Who Is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY* 63, 65 (Bruce J. Winick & John Q. LaFond eds., 2003) (discussing factors used to determine the likelihood that individual sex offenders will recidivate).

34. 42 U.S.C. §§ 16901-62 (2006 & Supp. 2009).

35. *Id.* § 16911(7).

36. Steven J. Costigliacci, Note, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 185 (2008).

37. See, e.g., ARIZ. REV. STAT. § 13-3821(A)(4) (2011) (requiring sex offender registration by anyone convicted of “sexual conduct with a minor pursuant to . . . [section] 13-1405,” which prohibits sexual intercourse or oral sex with someone younger than eighteen years old); DEL. CODE ANN. tit. 11, § 4121(a)(4) (West, Westlaw through 2011 legislation) (defining a sex offender, in relevant part, as anyone who violates section 768, which criminalizes sexual contact with another person under eighteen years old). But see FLA. STAT. ANN. § 943.04354 (West, Westlaw through 2011 legislation) (removing from the sex offender registry individuals who were forced to register for having consensual sex with someone between fourteen and seventeen years old and not more than four years younger than themselves).

38. See Mike Bruner, ‘Sexting’ Surprise: Teens Face Child Porn Charges, MSNBC.COM (Jan. 15, 2009), <http://www.msnbc.msn.com/id/28679588/>.

39. *Id.*

40. See *id.* (citing the opinion of an attorney who defends individuals charged with child pornography related crimes that “the prosecution of minors for photos *they took themselves* runs counter to the purpose of both state and federal child pornography laws: [p]reventing the sexual abuse of children by ‘dirty old men in raincoats.’” (emphasis added)).

### B. Statutes Regulating Sex Offenders

Federal, state, and local governments have attempted to prevent sex crimes for decades. Many states have enforced sex offender registration statutes for almost twenty years.<sup>41</sup> In an attempt to provide additional protection, governments subsequently adopted residency restrictions; the first state statutes were enacted in 2001.<sup>42</sup> When residency restrictions also failed to prevent sex crimes, some jurisdictions implemented anti-loitering statutes specifically targeting sex offenders.<sup>43</sup> No restriction can ensure complete safety, though. When tragedies occur, angry parents may not evaluate the effectiveness of current restrictions, but may instead seek vengeance through even greater restrictions<sup>44</sup> in what some are referring to as a “war on sex offenders.”<sup>45</sup> To avoid infringing on sex offenders’ rights and possibly create more effective policies, lawmakers must analyze the effectiveness of current and proposed restrictions without succumbing to the public’s emotional demands.

1. *Sex Offender Registration*.—Emotional outcries in response to sex crimes have made sex offender registration statutes a high legislative priority.<sup>46</sup> Each state (as well as the District of Columbia) enforces its own sex offender registration statute.<sup>47</sup> Many federal and state sex offender registration statutes

41. See, e.g., *Sex Offender Registry Fact Sheet*, MO. STATE HIGHWAY PATROL, <http://www.mshp.dps.mo.gov/MSHPWeb/PatrolDivisions/CRID/SOR/factsheet.html> (last visited June 6, 2011) (noting that Missouri began its sex offender registry in January 1995); *Sex Offender Web Site*, STATE OF N.D. OFFICE OF ATT’Y GEN., <http://www.sexoffender.nd.gov/FAQ/faq.shtml> (last visited June 4, 2011) (noting that North Dakota passed its first sex offender registration statute in 1991).

42. MARCUS NIETO & DAVID JUNG, CAL. RESEARCH BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW 15 (2006), available at <http://www.library.ca.gov/crb/06/08/06-008.pdf>.

43. See discussion *infra* Part I.B.3.

44. See Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267, 267 (2006) (discussing the events leading up to the passage of Megan’s Law: “Kanka’s parents were outraged that they did not know a convicted sex offender lived in the neighborhood and helped organize a statewide movement to reform laws regarding sex offenders.”).

45. See generally Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010).

46. The bill that became the Adam Walsh Child Protection and Safety Act of 2006 was self-described as “[a]n Act . . . to honor the memory of Adam Walsh and other child crime victims.” Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. (2006); see also LAFOND, *supra* note 22, at xiii (“Sex offenders are America’s most hated public enemy . . . . The public has demanded action and politicians have responded, passing new laws . . .”).

47. ALA. CODE §§ 13A-11-200 to -204 (2006 & Supp. 2010); ALASKA STAT. §§ 12.63.010 to -.100 (2010); ARIZ. REV. STAT. §§ 13-3821 to -3827 (2011); ARK. CODE ANN. §§ 12-12-901 to -920 (2010); CAL. PENAL CODE §§ 290.001 to -.95 (2010); COLO. REV. STAT. §§ 16-22-101 to -115 (2010); CONN. GEN. STAT. ANN. §§ 54-250 to -261 (West, Westlaw through 2011 legislation); DEL. CODE ANN. tit.11, §§ 4120 to -22 (West, Westlaw through 2011 legislation); D.C. CODE §§ 22-4001



bear the name of a child abused in that jurisdiction.<sup>48</sup> Under the Adam Walsh Child Protection and Safety Act of 2006,<sup>49</sup> sex offenders must register their names, Social Security numbers, addresses, places of employment or study, and license plate numbers.<sup>50</sup> The federal government then requires each state to notify

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to -4017 (2011); FLA. STAT. ANN. § 943.0435 (West, Westlaw through 2011 legislation); GA. CODE ANN. §§ 42-1-12 to -14 (2010); HAW. REV. STAT. §§ 846E-1 to -12 (West, Westlaw through 2011 legislation); IDAHO CODE ANN. §§ 18-8301 to -8328 (2010); 730 ILL. COMP. STAT. ANN. 150/1 to -/12 (West, Westlaw through 2011 Reg. Sess.); IND. CODE §§ 11-8-8-1 to -22 (2011); IOWA CODE ANN. §§ 692A.101 to -.130 (West, Westlaw through May 19 of 2011 Reg. Sess.); KAN. STAT. ANN. §§ 22-4901 to -4913 (2007 & Supp. 2009); KY. REV. STAT. ANN. §§ 17.500 to -.580 (West, Westlaw through 2010 legislation); LA. REV. STAT. ANN. §§ 15:540 to -:552 (West, Westlaw through 2010 legislation); ME. REV. STAT. ANN. tit. 34-A, §§ 11201-56 (West, Westlaw through 2009 1st Reg. Sess.); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -717 (West, Westlaw through 2011 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 6, §§ 178C-Q (West, Westlaw through 2011 1st Annual Sess.); MICH. COMP. LAWS ANN. §§ 28.721 to -.732 (West, Westlaw through 2011 Reg. Sess.); MINN. STAT. ANN. § 243.166 (West, Westlaw through 2011 Reg. Sess.); MISS. CODE ANN. §§ 45-33-21 to -59 (2010); MO. REV. STAT. §§ 589.400 to -.425 (2010); MONT. CODE ANN. §§ 46-23-501 to -520 (2009); NEB. REV. STAT. §§ 29-4001 to -4014 (2008 & Supp. 2010); NEV. REV. STAT. ANN. §§ 179D.010 to -.550 (West, Westlaw through 2010 Spec. Sess.); N.H. REV. STAT. ANN. §§ 651-B:1 to :12 (2007 & Supp. 2010); N.J. STAT. ANN. §§ 2C:7-1 to -18 (2011); N.M. STAT. ANN. §§ 29-11A-1 to -10 (West, Westlaw through 2011 legislation); N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney 2003 & Supp. 2011); N.C. GEN. STAT. §§ 14-208.5 to -208.45 (2011); N.D. CENT. CODE § 12.1-32-15 (1997 & Supp. 2009); OHIO REV. CODE ANN. § 2950.01-.99 (West, Westlaw through 2011 legislation); OKLA. STAT. ANN. tit. 57, §§ 581 to -87 (West, Westlaw through 2011 legislation); OR. REV. STAT. ANN. §§ 181.585 to -.606 (West, Westlaw through 2011 Reg. Sess.); 42 PA. CONS. STAT. ANN. §§ 9791-99.9 (West, Westlaw through 2011 Reg. Sess.); R.I. GEN. LAWS ANN. §§ 11-37.1-1 to -20 (West, Westlaw through 2011 1st Reg. Sess.); S.C. CODE ANN. §§ 23-3-400 to -550 (2007 & Supp. 2010); S.D. CODIFIED LAWS §§ 22-24B-1 to -34 (2010); TENN. CODE ANN. §§ 40-39-201 to -212 (West, Westlaw through 2011 1st Reg. Sess.); TEX. CRIM. PROC. CODE ANN. §§ 62.001 to -.408 (West, Westlaw through 2011 Reg. Sess.); UTAH CODE ANN. § 77-27-21.5 (West, Westlaw through 2010 legislation); VT. STAT. ANN. tit. 13, §§ 5401 to -14 (2010); VA. CODE ANN. §§ 9.1-900 to -922 (2010); WASH. REV. CODE ANN. §§ 9A.44.130 to -.145 (West, Westlaw through 2011 legislation); W. VA. CODE ANN. §§ 15-12-1 to -10 (West, Westlaw through 2011 Reg. Sess.); WIS. STAT. ANN. §§ 301.45 to -.48 (West, Westlaw through 2011 legislation); WYO. STAT. ANN. §§ 7-19-301 to -308 (West, Westlaw through 2010 legislation).

48. *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 (2006 & Supp. 2009) (listing seventeen children whose attacks demonstrated the need for federal legislation establishing sex offender registration requirements); Megan's Law, N.J. STAT. ANN. § 2C:7-1 to -18.

49. 42 U.S.C. §§ 16901-62.

50. *Id.* § 16914. States may also require additional information. For example, in Delaware, [t]he registration forms shall include, but are not limited to, the following information: the sex offender's legal name, any previously used names, aliases or nicknames, Social Security number, email address or addresses, Internet identifiers, and the age, gender, race and physical description of the sex offender. The registration form shall also

the public of sex offenders in its jurisdiction through an online registry.<sup>51</sup>

2. *Residency Restrictions*.—States and cities have adopted residency restrictions prohibiting sex offenders from living within a prescribed number of feet of schools, parks, day care centers, and other places where children frequently gather.<sup>52</sup> The most restrictive locales, such as the City of Sunny Isles Beach, Florida, prohibit sex offenders from living within 2500 feet of a school, school bus stop, day care center, park, playground, or other locations where children congregate.<sup>53</sup> Creation of zones with a radius of 2500 feet around each of these common locations greatly limits or renders nonexistent the remaining areas where a sex offender can live.

In *Doe v. Miller*,<sup>54</sup> the Eighth Circuit upheld Iowa's sex offender residency restriction, which forbids sex offenders from living within 2000 feet of a school.<sup>55</sup> The court noted that state legislatures may determine the best way to protect their constituents' health and welfare when insufficient statistical data exist to determine whether a restriction will achieve its stated goal.<sup>56</sup> The court assumed that the statement "[s]ex offenders are a serious threat in this Nation" was

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include all other known identifying factors, the offense history and the sex offender's current residences or anticipated place of future residences, places of study and/or places of employment, and the registration plate numbers and descriptions of any vehicles owned or operated by the offender, including any watercraft or aircraft with the locations where such vehicles are docked, parked, or otherwise stored, copies of that offender's passport, any licenses to engage in an occupation or to carry out a trade or business, and the offender's home telephone number and any cellular telephone numbers. The forms shall also include a statement of any relevant conditions of release, discharge, parole or probation applicable to the sex offender. Additionally, the form shall identify the age of the victim or victims of the offense or offenses and describe the victim's relationship to the offender. The form shall also indicate on its face that false statements therein are punishable by law. A photograph of the offender taken at the time of registration shall be appended to the registration form.

DEL. CODE ANN. tit. 11, § 4120(d)(2). Utah requires sex offenders to register their "Internet identifiers and the addresses the offender uses for routing or self-identification in Internet communications or postings." UTAH CODE ANN. § 77-27-21.5(14)(i). Despite the potential for a chilling effect on normally anonymous speech, this requirement has been upheld in the face of a First Amendment challenge. *Doe v. Shurtleff*, 628 F.3d 1217, 1227 (10th Cir. 2010).

51. 42 U.S.C. § 16918.

52. See, e.g., ALA. CODE § 15-20-26 (prohibiting sex offenders from living within 2000 feet of a school or day care center); CAL. PENAL CODE § 3003.5(b) (prohibiting registered sex offenders from living within 2000 feet of a school or park); NEWARK, N.J., REV. GEN. ORDINANCES tit. XX, ch. 26A, § 1 (2008) (prohibiting convicted sex offenders from living within 200 feet of a "school, playground, recreation center, or park"); STEPHENVILLE, TEX., CODE § 130.83(D) (2007) (making it unlawful for sex offenders to reside within 1000 feet of places where children gather).

53. SUNNY ISLES BEACH, FLA., CODE § 222-4(A) (2005).

54. 405 F.3d 700 (8th Cir. 2005).

55. IOWA CODE ANN. § 692A.114 (West, Westlaw through May 19 of 2011 Reg. Sess.).

56. *Miller*, 405 F.3d at 714.



rational<sup>57</sup> without drawing any distinction between types of sex offenders or their likelihood of recidivism.<sup>58</sup> The Eighth Circuit rejected fear of sex offenders or a desire to harm them as rationales for the residency restriction.<sup>59</sup> Assuming sex offenders have a high rate of recidivism, the court rationalized the residency restriction on this basis.<sup>60</sup> Ultimately, the court grounded its holding in “common sense”—specifically, on the notion that “limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense.”<sup>61</sup>

A Minnesota Department of Corrections study refutes the *Miller* court’s “common sense” reasoning. The study examined the offense characteristics of 224 Minnesota recidivists’ offenses and concluded that a residency restriction would not have prevented any of them.<sup>62</sup> Most of the cases involved a child victim the offender already knew.<sup>63</sup> Of the cases where the offender made initial contact with a stranger within 2500 feet of the offender’s residence, sixteen involved a minor victim, but none occurred near the locations designated by residency restriction statutes.<sup>64</sup> In three instances, the offense occurred in a prohibited location, but two instances involved an offender who lived more than ten miles away, and the other attack involved an adult victim.<sup>65</sup> These findings demonstrate that residency restrictions are ineffective and attacks in public places are exceedingly rare.

An analogous study by the Colorado Department of Public Safety Sex Offender Management Board reported similar findings. The report noted that residency restrictions may actually increase recidivism rates because they greatly limit the areas where offenders can live, thereby removing them from support

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57. *Id.* at 715 (quoting *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003)).

58. If all sex offenders are equally dangerous, statutes such as IOWA CODE ANN. § 692A.102, where the Iowa legislature classifies its sex offenders into three tiers based on their convicted offenses, would be unnecessary.

59. *Miller*, 405 F.3d at 716.

60. *Id. Contra* Dwight H. Merriam & Patricia E. Salkin, *Residency Restriction for Convicted Sex Offenders: A Popular Approach on Questionable Footing*, 2009 A.L.I. LAND USE INST. 95, 98 (identifying high recidivism of sex offenders as a popular myth to justify residency restrictions after examining the U.S. Department of Justice’s findings that only 5.3% of sex offenders reoffended three years after release).

61. *Miller*, 405 F.3d at 716. A little over a year after this decision, the Iowa County Attorneys Association issued a statement expressing its disbelief in the effectiveness of this law. IOWA CNTY. ATT’YS ASS’N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (Dec. 11, 2006), available at <http://www.iowa-icaa.com/ICAA%20STATEMENTS/Sex%20Offender%20Residency%20Statement%20Dec%2011%202006.pdf>.

62. MINN. DEP’T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA 1-2 (Apr. 2007), available at <http://www.doc.state.mn.us/publications/documents/04-07SexOffenderReport-Proximity.pdf>.

63. *See id.* at 2.

64. *Id.*

65. *Id.* at 23.

systems.<sup>66</sup> This study found the sites of sex crimes to be scattered throughout the community; they were not clumped near schools, day care centers, or other places children usually gather.<sup>67</sup> Although this study did not find the location of a sex offender's residence to be related to recidivism, it did find that sex offenders living in shared living arrangements with other sex offenders to whom they were accountable were less likely to reoffend than offenders living with friends or family.<sup>68</sup> This study shows that instead of focusing on where a sex offender lives, attention should be given to how and with whom offenders live.

3. *Anti-Loitering Ordinances.*—Anti-loitering ordinances are less restrictive than bans of sex offenders from public places, but the bans may have evolved from these anti-loitering ordinances.<sup>69</sup> In fact, Henderson County, North Carolina's ordinance, which forbids "a convicted child sex offender to knowingly loiter in any child safety zone," is titled "Prohibition of convicted child sex offenders in child safety zone."<sup>70</sup> This ordinance does not prohibit sex offenders from entering the "child safety zone," which includes public libraries, but it expressly states that a sex offender may not "loiter," which is defined as "[s]tanding, sitting idly, whether or not the person is in a vehicle or remaining in or around a child safety zone."<sup>71</sup> The risk of over-enforcement of these ordinances in libraries is high. A sex offender casually perusing a magazine at the library could be classified as "sitting idly."

Stephenville, Texas's anti-loitering ordinance is narrower than Henderson County's; it only prohibits a sex offender to "knowingly loiter *on a public way within 300 feet* of a [c]hild [s]afety [z]one."<sup>72</sup> Stephenville's anti-loitering provision can be narrower because it is supplemented by a provision prohibiting

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66. COLO. DEP'T OF PUB. SAFETY SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 9 (2004), available at <http://dcj.state.co.us/ors/pdf/docs/fullSLAfinal.pdf>.

67. *Id.* at 30.

68. *Id.* at 25.

69. Not only is banning someone's presence one step removed from prohibiting loitering, but some of the sex offender bans involve "child safety zones" similar to those defined in anti-loitering statutes. Compare NEW BEDFORD, MASS., CODE § 17-26(1) (2008), with HENDERSON CNTY., N.C., CODE § 130A-50 (2008).

70. HENDERSON CNTY., N.C., CODE § 130A-50(B).

71. *Id.* § 130A-50(A).

72. STEPHENVILLE, TEX., CODE § 130.83(C) (2007) (emphasis added). Stephenville's "child safety zone" includes

[p]ublic parks, private and public schools, *public library*, amusement arcades, video arcades, indoor and outdoor amusement centers, amusement parks, public or commercial and semi-private swimming pools, child care facility, child care institution, public or private youth soccer or baseball field, crisis center or shelter, skate park or rink, public or private youth center, movie theater, bowling alley, scouting facilities and Offices for Child Protective Services.

*Id.* § 130.82 (emphasis added).



sex offenders from knowingly entering a “child safety zone.”<sup>73</sup> Similarly, Iowa forbids a sex offender whose victim was a minor from loitering within three hundred feet of a school, child care facility, public library, or “any place intended primarily for the use of minors.”<sup>74</sup>

Methuen, Massachusetts also couples an anti-loitering provision with a prohibition of registered sex offenders’ entrance to designated areas—such as schools, libraries, recreational facilities, and housing for the elderly and mentally retarded—but requires the Methuen Police Department to notify a registered sex offender of his or her loitering before the individual can be subject to penalties for loitering.<sup>75</sup> This loitering provision also encompasses a broader area than the Stephenville or Iowa loitering restrictions by prohibiting registered sex offenders from loitering within five hundred feet of the protected locations.<sup>76</sup> However, the Methuen ordinance instructs law enforcement to measure the minimum distance “by following a straight line from the location where the [r]egistered [s]ex [o]ffender is or was present to the outer property line of the [s]chool, a [d]ay [c]are [c]enter, a [p]ark, any [r]ecreational [f]acility, [e]lderly [h]ousing [f]acility or [f]acility for the [m]entally [r]etarded.”<sup>77</sup>

Despite the efforts of the aforementioned restrictions, sex offenses continue to plague society. However, instead of examining the efficacy of existing sex offender regulations and addressing their deficiencies,<sup>78</sup> government officials usually respond by adding more restrictions.<sup>79</sup> Because the label “sex offender” encompasses a wide variety of individuals,<sup>80</sup> it is difficult to create legislation strong enough to deter the worst offenders without excessively restricting those who are sex offenders because of a technicality. Unfortunately, many jurisdictions’ citizens do not worry about excessive restrictions.<sup>81</sup>

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73. *Id.* § 130.83(B).

74. IOWA CODE ANN. § 692A.113(1)(h) (West, Westlaw through May 19 of 2011 Reg. Sess.).

75. *See* METHUEN, MASS., MUN. CODE ch. 27, §§ 1, 3(A) (2008).

76. *Id.* § 3(A)(4).

77. *Id.*

78. An efficacy study of New Jersey’s Megan’s Law was conducted in 2008; it found that “Megan’s Law showed no demonstrable effect in reducing sexual re-offenses. . . . Megan’s Law has no effect on reducing the number of victims involved in sexual offenses.” KRISTEN ZGOBA ET AL., N.J. DEP’T OF CORR., MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 2 (2008), available at <http://www.nj.gov/defender/news/MegansLawAssessingEfficacy.pdf>. Despite these findings, Megan’s Law has not been amended since 2008. *See* N.J. STAT. ANN. § 2C:7-1 to -18 (2011).

79. *See supra* Parts I.B.2-3; *see also* A.B. 1844 (Cal. 2010) (The Chelsea King Child Predator Prevention Act of 2010, which was signed into law on September 9, 2010, increases the penalties for criminal defendants found guilty of various sex crimes against children.).

80. *See supra* notes 32-40 and accompanying text.

81. The Rowan County Board of Commissioners provided public notice when it proposed an ordinance banning sex offenders from public places. No public comments were received, and only one individual inquired about public hearings regarding the proposed ordinance. Minutes of the Meeting of the Rowan Cnty. Bd. of Comm’rs 3-4 (Apr. 7, 2008) [hereinafter Rowan Cnty. Apr.

## II. BANS OF SEX OFFENDERS FROM PUBLIC LIBRARIES

Few jurisdictions currently ban sex offenders from public libraries, but additional communities may be considering this type of restriction.<sup>82</sup> When sex offender restrictions are upheld, additional jurisdictions add similar legislation.<sup>83</sup> However, following *Doe v. City of Albuquerque*,<sup>84</sup> other jurisdictions may reconsider plans to adopt a similar ban.<sup>85</sup> Bans of sex offenders from public libraries exist at the state,<sup>86</sup> county,<sup>87</sup> and municipal<sup>88</sup> levels of government in nearly all regions of the United States.<sup>89</sup> Some of the currently enforced bans include libraries among places where sex offenders cannot be present,<sup>90</sup> while other legislation creates “child safety zones”—including libraries—which sex offenders may not enter.<sup>91</sup>

### A. Currently Enforced Bans of Sex Offenders from Public Libraries

1. *State Statute.*—Currently, the only state-level ban of sex offenders from public libraries is in Iowa, and it only applies to sex offenders convicted of a sex offense against a minor.<sup>92</sup> Iowa’s ban of sex offenders from libraries and other

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7, 2008 Minutes], available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (click “Minutes”, then click “2000s”, then click “2008”, and open “cm 080407.pdf.”).

82. See H.B. 1100, 2011 Gen. Assemb., 1st Reg. Sess. (Ind. 2011) (“A registered sex offender who knowingly or intentionally enters a public library . . . commits sex offender library trespass, a Class D felony.”).

83. See Megan McCurdy, Case Note, *Doe v. Miller*, 38 URB. LAW. 360, 361 (2006) (noting that Polk County and Des Moines, Iowa amended their residency restrictions to include additional public places sex offenders could not reside near following *Doe v. Miller*); Rowan Cnty. Apr. 7, 2008 Minutes, *supra* note 81, at 3 (noting that the Rowan County Planning Board used Woodfin’s ordinance banning sex offenders from parks as a model after the North Carolina Court of Appeals upheld it).

84. No. 08-cv-01041-MCA-LFG (D.N.M. Mar. 31, 2010).

85. See Neil Vigdor, *Sex Offender Ban Going Back to RTM*, GREENWICH TIME, May 10, 2010, available at <http://www.greenwichtime.com/local/article/Originally-in-the-Sunday-paper-Sex-offender-ban-481180.php> (noting that the original proposed ban was changed so that libraries would not be included in child safety zones).

86. IOWA CODE ANN. § 692A.113(1)(f) (West, Westlaw through May 19 of 2011 Reg. Sess.).

87. ROWAN CNTY., N.C., CODE § 15-3(b) (2008).

88. NEW BEDFORD, MASS., CODE § 17-26(1) (2008); STEPHENVILLE, TEX., CODE §§ 130.82-.83 (2007).

89. IOWA CODE ANN. § 692A.113(1)(f); ROWAN CNTY., N.C., CODE § 15-3(b); NEW BEDFORD, MASS., CODE § 17-26(1); STEPHENVILLE, TEX., CODE §§ 130.82-.83.

90. See, e.g., IOWA CODE ANN. § 692A.113.

91. NEW BEDFORD, MASS., CODE § 17-26(1); STEPHENVILLE, TEX., CODE §§ 130.82-.83.

92. IOWA CODE ANN. § 692A.113(1).



public places evolved from Polk County<sup>93</sup> and Des Moines<sup>94</sup> ordinances. These ordinances added public pools and libraries to the list of locations near which sex offenders could not live following the Eighth Circuit's decision in *Doe v. Miller*,<sup>95</sup> which allowed the government to prohibit sex offenders from living near schools and child care facilities.<sup>96</sup> In 2009, these local ordinances were repealed when the Iowa General Assembly passed statutes prohibiting sex offenders' residences within 2000 feet of a school or child care facility<sup>97</sup> and their presence on library or pool property.<sup>98</sup>

Many similarities exist among public library policies adopted to comply with the Iowa statute.<sup>99</sup> To enter library property, sex offenders usually must appeal to the library's board of trustees.<sup>100</sup> Library materials may be borrowed through a designee who uses the sex offender's library card.<sup>101</sup> Sex offenders may receive books and other media through home delivery from select libraries,<sup>102</sup> but many libraries will not provide this service to sex offenders.<sup>103</sup> Furthermore, because sex offenders cannot be present on library property, they cannot access information available only inside the library, such as non-circulating reference materials and local history archives.<sup>104</sup> An affected offender might, however, request that library staff conduct local history or genealogy research on his or her behalf for a modest fee.<sup>105</sup> Currently, Iowa remains a test case that other states can monitor to ascertain if bans will abate sex offenses and survive constitutional challenges.

2. *County Ordinance.*—Because most states do not ban sex offenders from public libraries, counties may enact similar ordinances. Local ordinances may be a more appropriate source of sex offender restrictions because they allow each

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93. POLK CNTY., IOWA, ORDINANCE 238 (2005) (repealed 2009).

94. DES MOINES, IOWA, CODE §§ 70-307 to -311 (2005) (repealed 2009).

95. 405 F.3d 700 (8th Cir. 2005).

96. McCurdy, *supra* note 83, at 360.

97. IOWA CODE ANN. § 692A.114.

98. *Id.* § 692A.113.

99. *See Sex Offender Against Minors Policy*, KNOXVILLE PUB. LIBRARY, <http://www2.youseemore.com/knoxville/about.asp?loc=20> (last modified Sept. 16, 2009) [hereinafter *Knoxville Policy*]; *Sex Offender Policy from Iowa City Public Library*, STATE LIBRARY OF IOWA (July 23, 2009), <http://www.statelibraryofiowa.org/ld/k-p/Policies/ic/> [hereinafter *Iowa City Policy*]; *WATERLOO PUB. LIBRARY, REGISTERED SEX OFFENDERS POLICY* (July 13, 2009), available at <http://www.waterloo.lib.ia.us/library-information/policies/offender> [hereinafter *Waterloo Policy*].

100. *Iowa City Policy*, *supra* note 99; *Knoxville Policy*, *supra* note 99; *Waterloo Policy*, *supra* note 99.

101. *Iowa City Policy*, *supra* note 99; *Knoxville Policy*, *supra* note 99; *Waterloo Policy*, *supra* note 99.

102. *Iowa City Policy*, *supra* note 99.

103. *See, e.g., Knoxville Policy*, *supra* note 99.

104. *See Genealogy Research Policies*, AKRON PUB. LIBRARY, <http://www.akron.lib.ia.us/library-information/policies/access/Genealogy> (last modified Mar. 13, 2010).

105. *See id.*

community to determine the appropriate balance between public safety and individual rights based on its own standards. An example of a county ordinance is Rowan County, North Carolina's, which reads "Registered sex offenders prohibited from entering Rowan County parks, recreation areas, fairgrounds and public libraries."<sup>106</sup>

The relevant portion of Rowan County's ordinance reads, "No registered sex offender shall enter into or upon any Rowan County parks, recreation area, fairgrounds, or public libraries operated by the County of Rowan."<sup>107</sup> This ordinance did not initially include libraries; rather, it sought only to protect people in Rowan County parks and recreation areas.<sup>108</sup> The planning board confidently added other public locations to the proposed ordinance<sup>109</sup> after October 2007, when the North Carolina Court of Appeals upheld a similar ordinance banning sex offenders from public parks in *Standley v. Town of Woodfin*.<sup>110</sup> The board of commissioners stated at that time that the purpose of the resolution was "to protect children."<sup>111</sup> Local ordinances like these are passed by legislators who likely know the children whose protection is at stake. In these instances, there is great danger that emotion can undermine considerations of sex offenders' rights.

3. *Municipal Ordinance*.—Most bans of sex offenders from public libraries are issued by cities.<sup>112</sup> Sometimes, these ordinances respond to improper activities that occur at the local library.<sup>113</sup> Municipal ordinances attempting to protect children from harm favor the "child safety zone" approach.<sup>114</sup>

Stephenville, Texas's "Sex Offender Prohibition" is a municipal ordinance that prohibits a sex offender from "knowingly enter[ing] a [c]hild [s]afety [z]one."<sup>115</sup> Public libraries are included in the term "child safety zone."<sup>116</sup> This

106. ROWAN CNTY., N.C., CODE § 15-3 (2008).

107. *Id.* § 15-3(b).

108. *See* Rowan Cnty. Sept. 4, 2007 Minutes, *supra* note 15, at 16.

109. *See* Rowan Cnty. Apr. 7, 2008 Minutes, *supra* note 81, at 3-4.

110. 650 S.E.2d 618, 623 (N.C. Ct. App. 2007), *aff'd*, 661 S.E.2d 728 (N.C. 2008).

111. Minutes of the Meeting of the Rowan Cnty. Bd. of Comm'rs 19 (Apr. 21, 2008) [hereinafter Rowan Cnty. Apr. 21, 2008 Minutes], available at <http://www.co.rowan.nc.us/GOVERNMENT/Commission/MinutesandAgendas/tabid/447/Default.aspx> (click "Minutes", then click "2000s", then click "2008", and open "cm 080421.pdf").

112. *Compare* Part II.A.1-2, with Part II.A.3-B.

113. *See, e.g.,* Jack Encarnacao, *Quincy Moves to Ban Sex Offenders from Libraries, Parks*, PATRIOT LEDGER, Dec. 29, 2009, available at [http://www.patriotledger.com/news/cops\\_and\\_courts/x1444026856/Quincy-moves-to-ban-sex-offenders-from-libraries-parks](http://www.patriotledger.com/news/cops_and_courts/x1444026856/Quincy-moves-to-ban-sex-offenders-from-libraries-parks) (reporting that a Quincy, Massachusetts city councilor's reason for considering the ordinance was that a teenager had witnessed a man masturbating while viewing pornography on a library computer).

114. *See* NEW BEDFORD, MASS., CODE § 17-26(1)(a)(i) (2008); STEPHENVILLE, TEX., CODE § 130.83 (2007); Encarnacao, *supra* note 113 (noting that the proposed Quincy, Massachusetts ordinance would establish "safety zones").

115. STEPHENVILLE, TEX., CODE § 130.83(B).

116. *Id.* § 130.82.



restriction applies only to offenders whose victim was under seventeen years old<sup>117</sup> and does not apply to offenders who were minors at the time of the offense *and* were not tried as adults.<sup>118</sup> The “Purpose and Intent” of the ordinance reads as follows:

It is the intent of this subchapter to serve the city’s *compelling interest* to promote, protect and improve the health, safety and welfare of the citizens of the city by creating areas around locations where children regularly congregate in concentrated numbers wherein certain registered sex offenders and sexual predators are prohibited from loitering or prohibited from establishing temporary or permanent residency.<sup>119</sup>

This wording shows that the city council anticipated a constitutional challenge. Surprisingly, prohibiting sex offenders from child safety zones is not linked here with serving a compelling interest.<sup>120</sup>

Another example is New Bedford, Massachusetts’s ordinance, “Child Sex Offender in Child Safety Zone.”<sup>121</sup> New Bedford passed this ordinance banning sex offenders from public places—including libraries—after a convicted sex offender raped a six-year-old boy in the New Bedford Public Library.<sup>122</sup> This ordinance includes the library in the “child safety zone”<sup>123</sup> and prohibits registered sex offenders from being present in any “child safety zone.”<sup>124</sup>

The New Bedford ban recognizes that not all sex offenders pose the same threat to children and applies only to level two and three offenders.<sup>125</sup> It also

117. *Id.*

118. *Id.* § 130.85(D).

119. *Id.* § 130.82 (emphasis added).

120. *See id.*

121. NEW BEDFORD, MASS., CODE § 17-26 (2008). Of the ban examples provided in this Note, the New Bedford ordinance is the most detailed.

122. *See* Marie Szanislo, *Alleged New Bedford Library Rape Prompts Action*, BOS. HERALD, Feb. 16, 2008, at 6.

123.

*Child safety zone* means: (a) A park, playground, recreation center, *library*, school, day care center, private youth center, video arcade, bathing beach, swimming pool or wading pool, gymnasium, sports field, or sports facility, including the parking area and land adjacent to any of the aforementioned facilities, and school or camp bus stops, which is: 1) Under the jurisdiction of any department, agency, or authority of the City of New Bedford, including but not limited to the School Department of the City of New Bedford, or 2) Leased by the City of New Bedford to another person for the purpose of operating a park, playground, recreation center, bathing beach, swimming pool or wading pool, gymnasium, sports field, or sports facility.

NEW BEDFORD, MASS., CODE § 17-26(1)(a)(i) (second emphasis added).

124. *Id.* § 17-26(1)(b).

125. *Id.* § 17-26(1)(a)(ii)(a). Level two offenders are those whose “risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information.” MASS. GEN. LAWS ANN. ch. 6, §

provides for several exceptions when sex offenders may enter the “child safety zone.”<sup>126</sup> The New Bedford ordinance allows sex offenders to conduct business at government facilities, but it specifically excludes libraries from this exception.<sup>127</sup> Only sex offenders whose polling place is the library may ever visit the library, and even then, offenders may enter the library only to vote.<sup>128</sup> This ordinance’s limited application and specific exceptions reflect the impracticability of enforcing a complete ban of sex offenders from public places. The exceptions also create a more equitable restriction despite the emotional circumstances that inspired the ban.

Methuen, Massachusetts’s ordinance, “Registered Sex Offender Restrictions,” was also inspired in part by the attack at the New Bedford Public Library.<sup>129</sup> This ordinance does not create “child safety zones,” although Section 3 is entitled “Safety Zones,” but it specifies that

[a] [r]egistered [s]ex [o]ffender is prohibited from entering upon the premises of a [s]chool or [d]ay [c]are [c]enter unless previously authorized specifically in writing by the [s]chool administration or [d]ay [c]are [c]enter owner . . . an [e]lderly [h]ousing [f]acility or [f]acility for the [m]entally [r]etarded unless previously authorized in writing by the on-site manager . . . . In the case of those dwellings under the ownership, administration, or operation to the Methuen Housing Authority a [r]egistered [s]ex [o]ffender is prohibited from entering upon the premises thereof unless previously authorized in writing by the executive director of the Methuen Housing Authority to do so, [or] a [p]ark or any [r]ecreational [f]acility.<sup>130</sup>

Public libraries are included under the definition of “school.”<sup>131</sup> Like New

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178K(2)(b) (West, Westlaw through 2011 1st Annual Sess.). A level three offender is someone whose “risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination.” *Id.* § 178K(2)(c). The city of Quincy, Massachusetts also bans sex offenders from libraries but limits its ban only to these most dangerous level III offenders. *See King, supra* note 4. By contrast, level one offenders’ “risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability.” MASS. GEN. LAWS ANN. ch. 6, § 178K(2)(a). For more information on level one offenders in Massachusetts, see Jenai J. Cormier, Note, *Noble in Theory, Vain in Practice: A Critique of Level One Sex Offenders in Massachusetts*, 44 NEW ENG. L. REV. 103 (2009).

126. *See* NEW BEDFORD, MASS., CODE § 17-26(1)(c).

127. *Id.* § 17-26(1)(c)(vi)(a).

128. *Id.* § 17-26(1)(c)(iv).

129. City councilor Willette argued in support of the ordinance, “You’ve had Level 3 sex offenders travel into public libraries and attack children. . . . It’s well documented throughout the last year . . . .” J.J. Huggins, *Sex Offender’s Family Opposes Law on ‘Predator Free’ Zones*, EAGLE-TRIB., July 13, 2008 (on file with author).

130. METHUEN, MASS., MUN. CODE ch. 27, §§ 3(A)(1)-(3) (2008).

131. *Id.* § 1.



Bedford's ordinance, the Methuen ordinance applies only to level two, level three, and SVP offenders,<sup>132</sup> and it provides an exception for offenders to vote if one of the prohibited locations is his or her polling place.<sup>133</sup> This ordinance is unique in that it also provides for posting of level three offenders at the Nevins Library and the other locations where offenders are not allowed.<sup>134</sup> Thus, the ordinance shows that there are so few offenders in their community that they can easily post their pictures in a public area of each location.

### *B. Unconstitutional Ban of Sex Offenders from Public Libraries*

Before delving into why the initial Albuquerque ban was declared unconstitutional,<sup>135</sup> it is important to understand some of its unique aspects. The Albuquerque ban was established by an executive instruction signed by Albuquerque's former mayor, Martin Chavez.<sup>136</sup> Proper municipal executive instruction subject matter varies by jurisdiction and depends on the mayoral duties assigned by the city's charter.<sup>137</sup> Generally, the legislature, as the most politically accountable branch, should make important policy decisions.<sup>138</sup> Municipal executive instructions are often used to make appointments<sup>139</sup> or regulate mundane matters, such as how city employees answer the telephone.<sup>140</sup>

Despite the tradition of using executive instructions to facilitate the daily operations of city government, in 2008, former Albuquerque mayor Martin J. Chavez issued Executive Instruction No. 25, which prohibited registered sex offenders from entering public libraries in the City of Albuquerque.<sup>141</sup> His goal

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132. *Id.*

133. *Id.* § 3(B)(1).

134. *Id.* § 4(A). This posting is similar to an attempted de facto ban of sex offenders from public libraries in Boston in 2005. In that instance, then-Mayor Thomas Menino provided public libraries with mug shots of the most serious sex offenders in Boston in order to help librarians identify them and ask them to leave if they were engaging in suspicious behavior. Allegedly registered sex offenders would be allowed to stay at the library if they were in compliance with library use policies. Kevin Rothstein, *Stacked Against Them: Perv Mugshots Will Hang in Libraries*, BOS. HERALD, Aug. 13, 2005, at 2. However, if librarians should be looking out for suspicious behavior from any patron, why are pictures of registered sex offenders necessary?

135. See discussion *infra* Part IV.B.3.

136. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

137. For example, Albuquerque, New Mexico's charter delegates executive and administrative power to the mayor to organize and delegate responsibility to city employees. See CITY OF ALBUQUERQUE, CHARTER art. 5, §§ 3-4 (2007).

138. See *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

139. See, e.g., ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 3: APPOINTMENT OF CHIEF ADMINISTRATIVE OFFICER (Dec. 5, 2005) (on file with author).

140. ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 11: TELEPHONE COURTESY (Aug. 8, 2000) (on file with author).

141. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

was to prevent predators from accessing children and public computers where they could talk to children.<sup>142</sup> The executive instruction required libraries to initially notify library card-carrying sex offenders that they could not enter any public library in Albuquerque.<sup>143</sup> After this initial notification, law enforcement agencies were responsible for enforcing Executive Instruction No. 25.<sup>144</sup> The Albuquerque/Bernalillo County Library System also provided continual notice to sex offenders in its building use rules, which read in part, “City of Albuquerque policy prohibits registered sex offenders from using public library facilities.”<sup>145</sup> Two days after the ruling in *Doe v. City of Albuquerque*, which held the ban unconstitutional,<sup>146</sup> this line was removed from the building use rules.<sup>147</sup> Albuquerque’s ban, as an executive instruction that applied only to libraries,<sup>148</sup> was unique.

However, the City of Albuquerque did not abandon its efforts to protect children following *Doe v. City of Albuquerque*. In addition to appealing the decision, Albuquerque’s current mayor, Richard Berry, signed a new executive instruction on May 6, 2010.<sup>149</sup> This instruction allows registered sex offenders to visit the main library in downtown Albuquerque only on Thursdays and Saturdays between 10:00 A.M. and 6:00 P.M., and they must sign in with security officers, provide photo identification, and refrain from visiting the children’s section.<sup>150</sup>

### C. Comparison of the Bans

Although each ban has a distinct scope, several similarities exist among them. Even though the Iowa, Stephenville, and New Bedford bans are limited to sex offenders with minor victims, all of the bans target a wide range of offenders,<sup>151</sup>

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142. Scott Sandlin, *Sex Offender Library Ban Overturned*, ALBUQUERQUE J., Apr. 2, 2010, at C1.

143. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2. However, when this law was enforced, the police compared the list of library card holders with sex offender registries and sent criminal trespass warnings to those on both lists. Sandlin, *supra* note 142.

144. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

145. ALBUQUERQUE/BERNALILLO CNTY. LIBRARY SYS., ORIGINAL BUILDING USE RULES (on file with author).

146. *Doe v. City of Albuquerque*, No. 08-cv-01041-MCA-LFG, slip op. at 42 (D.N.M. Mar. 31, 2010).

147. *See Library Organization & Policies*, CITY OF ALBUQUERQUE, <http://www.cabq.gov/library/policies/index.html#conduct> (last visited June 4, 2011).

148. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

149. ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25: AMENDED INSTRUCTION REGARDING REGISTERED SEX OFFENDERS IN PUBLIC LIBRARIES (May 6, 2010), *available at* <http://www.solresearch.org/~SOLR/cache/gov/US/loc/NM-Alb/20100506-SOsInLibrary.pdf>.

150. *Id.*

151. *See supra* Part II.A-B.



including individuals who pose a minimal risk to children.<sup>152</sup> Each ban also restricts offenders' rights to some level of public library access.<sup>153</sup> In addition, each ban—except the Iowa statute—designates law enforcement officers, as opposed to library employees, as the party responsible for enforcing the law.<sup>154</sup>

Although these bans have many similarities, important differences exist among them as well. Of all the bans, only the original Albuquerque executive instruction applied solely to libraries.<sup>155</sup> The ordinances and the Iowa statute also apply to parks, schools, and day care centers.<sup>156</sup> The Iowa statute and the Stephenville ordinance not only prohibit sex offenders' presence at schools, child care facilities, public libraries, playgrounds, and swimming pools, but also forbid sex offenders to loiter within three hundred feet of these locations.<sup>157</sup> The Methuen ordinance extends the boundary for loitering to within five hundred feet of these locations.<sup>158</sup> The Iowa statute also prohibits sex offenders from working or volunteering at events or facilities where children are present.<sup>159</sup> The New Bedford and Methuen ordinances are unique because they exclude level one offenders in Massachusetts from their reach<sup>160</sup> and apply only to more dangerous level two and three offenders.<sup>161</sup> The other bans fail to distinguish sex offenders based on their risk of recidivism.

Another difference among the bans has to do with the communities' comparative experiences with sex offenders. Each ban seeks to protect individuals from sexual assault, but only the New Bedford ordinance<sup>162</sup> and, arguably, the Iowa statute,<sup>163</sup> responded to events in those jurisdictions.<sup>164</sup> The

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152. Under federal law, a sex offense can be a crime with a sexual component or "a criminal offense that is a specified offense against a minor." 42 U.S.C. § 16911(5)(A)(ii) (2006). Therefore, sex offenders include individuals who commit sex offenses only against adults. Also, an individual whose minor "victim" was a teenage boyfriend or girlfriend is unlikely to pose a risk to children generally.

153. See *supra* Part II.A-B.

154. METHUEN, MASS., MUN. CODE ch. 27, § 6(A) (2008); NEW BEDFORD, MASS., CODE § 17-26 (2008); ROWAN CNTY., N.C., CODE § 15-3(b) (2008); STEPHENVILLE, TEX., CODE § 180.84(A) (2007); see also ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

155. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

156. See *supra* Part II.A.

157. IOWA CODE ANN. § 692A.113(1) (West, Westlaw through May 19 of 2011 Reg. Sess.); STEPHENVILLE, TEX., CODE § 180.83.

158. METHUEN, MASS., MUN. CODE ch. 27, § 3(A)(4).

159. See IOWA CODE ANN. § 692A.113(3).

160. See METHUEN, MASS., MUN. CODE ch. 27, § 1; NEW BEDFORD, MASS., CODE § 17-26(1)(a)(ii) (2008).

161. METHUEN, MASS., MUN. CODE ch. 27, § 1; NEW BEDFORD, MASS., CODE § 17-26(1)(a)(ii). The Quincy, Massachusetts ban also shares this quality, but it is even more tailored to only level three offenders. King, *supra* note 4.

162. NEW BEDFORD, MASS., CODE § 17-26.

163. IOWA CODE ANN. § 692A.113.

164. See *Des Moines Library Staff Rescues Girl from Sex Offender*, AM. LIBRARY ASS'N (Oct.

original Albuquerque executive instruction,<sup>165</sup> Stephenville ordinance,<sup>166</sup> and Rowan County ordinance<sup>167</sup> do not appear to respond to actual crimes committed in a public place, but only to the belief that a threat existed.<sup>168</sup>

All of the bans prohibit sex offenders from entering a public library legally, but each ban achieves this result through different levels of specificity.<sup>169</sup> The bans range from the detailed Methuen and New Bedford ordinances that focus on more dangerous sex offenders<sup>170</sup> to the blunt Albuquerque executive instruction, which the local media described as the “firing [of] another shot in . . . [Albuquerque mayor Martin Chavez’s] war with sex offenders.”<sup>171</sup> Ultimately, each ban creates a conflict between safety and liberty concerns.

### III. CONFLICTING INTERESTS

When convicted sex offenders’ rights conflict with innocent children’s safety, governments tend to protect children without reservation. Due to their law violations and, in some cases, abusive actions toward children, it is often difficult to promote consideration of sex offenders’ interests. Nonetheless, sex offenders’ interest in public library access should be seriously considered, as opposed to deeming their interest insignificant in comparison to the government’s conflicting interest in child protection.

#### A. Government Interests

Governments have three primary interests in regulating sex offenders’ post-release behavior: deterring criminal conduct, protecting the public from defendants’ future crimes, and meeting offenders’ “educational, vocational, medicinal or other correctional needs.”<sup>172</sup> The state’s constitutionally recognized police power authorizes deterrence of criminal conduct.<sup>173</sup> However, before a

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7, 2005), <http://www.ala.org/ala/online/currentnews/newsarchive/2005abc/october2005ab/desmoines.cfm> (describing an incident at the Des Moines Public Library where a sex offender took a twenty-month-old girl into the men’s bathroom); *see also supra* note 122 and accompanying text.

165. ORIGINAL ALBUQUERQUE, N.M., EXEC. INSTRUCTION NO. 25, *supra* note 2.

166. STEPHENVILLE, TEX., CODE § 180.80 (2007).

167. ROWAN CNTY., N.C., CODE § 15-3 (2008).

168. *See* Rowan Cnty. Apr. 21, 2008 Minutes, *supra* note 111, at 19 (citing general protection of children as the ordinance’s purpose). However, the City of Albuquerque claimed that its executive instruction was a response to the attack in New Bedford. *See Doe v. City of Albuquerque*, No. 08-cv-01041-MCA-LFG, slip op. at 26 (D.N.M. Mar. 31, 2010).

169. *See supra* Part II.A-B.

170. METHUEN, MASS., MUN. CODE ch. 27 (2008); NEW BEDFORD, MASS., CODE § 17-26 (2008).

171. *Libraries Ban Sex Offenders*, KOAT ALBUQUERQUE (Mar. 5, 2008), <http://www.koat.com/news/15493567/detail.html>.

172. *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009).

173. *See* U.S. CONST. amend. X.



municipality may exercise this power, it must be delegated by the state.<sup>174</sup>

The government seeks to protect the public from all convicts' future crimes. However, it also possesses a heightened interest in the prevention of future sex crimes by known sex offenders, as evidenced by the U.S. Sentencing Guidelines, which discourage a decrease of a defendant's criminal history category if he or she is a "repeat and dangerous sex offender against minors."<sup>175</sup> Government officials who research the best methods to protect the public from sex offenders often conclude that prohibiting sex offenders from public areas is the most effective option.<sup>176</sup>

Although the government strives to protect all citizens from sex offenses, it focuses primarily on preventing children from becoming sex offenders' targets.<sup>177</sup> Governmental bodies justify bans of sex offenders from public places on the premise that if sex offenders are not present where children gather, these individuals will be less tempted and have fewer opportunities to reoffend.<sup>178</sup> The government seeks to protect children not only in public places, but also online. The Internet allows sex offenders to converse freely and anonymously with minors in teenage chat rooms.<sup>179</sup> Consequently, restrictions on convicted sex offenders' computer and Internet usage attempt to protect children from this threat.<sup>180</sup>

Due to the harmful effects of sexual assault and the devious nature of many offenders, governments usually promote safety by restricting all sex offenders rather than creating restrictions targeted at only the most dangerous offenders.<sup>181</sup> Perhaps these governments fear that more targeted restrictions could provide some truly deviant lower-level sex offenders full access to society's privileges and therefore more opportunities to reoffend. Some sex offenders believe they are talented at identifying vulnerable children who are more easily groomed.<sup>182</sup>

174. *XO Mo., Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1027 (8th Cir. 2004).

175. U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(b)(2)(B) (2010). A "repeat and dangerous sex offender against minors" is someone whose current offense is a sex crime, who is not a career offender under section 4B1.1, and who has a prior sex offense conviction. *Id.* § 4B1.5(a).

176. *See Standley v. Town of Woodfin*, 661 S.E.2d 728, 729 (N.C. 2008).

177. *Doe v. Miller*, 405 F.3d 700, 714 (8th Cir. 2005).

178. *See Janet Mandelstam & Carrie Mulford, Unintended Consequences of Sex Offender Residency Laws: Can GIS Mapping Help?*, CORR. TODAY, Aug. 2008, at 104.

179. Virginia Kendall, *The Lost Child: Congress's Inability to Protect Our Teenagers*, 92 NW. U. L. REV. 1307, 1307 (1998).

180. *See Marlon A. Walker, MySpace Removes 90,000 Sex Offenders*, MSNBC.COM (Feb. 3, 2009), <http://www.msnbc.msn.com/id/28999365> (reporting that neither MySpace nor Facebook allows registered sex offenders to set up profiles).

181. *See, e.g., CAL. PENAL CODE* § 3003.5 (2010); NEWARK, N.J., REV. GEN. ORDINANCES tit. XX, ch. 26A, § 1 (2008).

182. SALTER, *supra* note 30, at 66. Definitions of "grooming" vary, but those who have examined the literature in this area provide the following overarching definition:

A process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining

Preferential child molesters select victims based on age and will shower a victim with attention and gifts to gain the victim's trust.<sup>183</sup> Once the offender gains the child's trust, the offender will molest and then "dump" the child, moving on to another victim.<sup>184</sup> Consequently, the deceitful nature of many child molesters prompts governments to adopt far-reaching restrictions to prevent children from experiencing the pain associated with intense seduction followed by immediate rejection.<sup>185</sup>

The protection of children from sexual abuse and its devastating effects is a high priority for reasons of public policy. Child victims of sexual assault are more likely to abuse alcohol and drugs, suffer from depression, anxiety, nightmares, and social isolation, and commit suicide.<sup>186</sup> These children feel responsible for upsetting their family members if they report abuse and often blame themselves for the abuse.<sup>187</sup> Many childhood sexual abuse survivors feel guilt and shame and continue to experience emotional and psychological isolation long after the physical abuse has ceased.<sup>188</sup>

However, governments are also interested in reintegrating paroled offenders into society.<sup>189</sup> Governments attempt to accomplish this task by meeting sex offenders' "educational, vocational, medicinal or other correctional needs" during the supervised release period.<sup>190</sup> Nevertheless, a conflict exists between the government's interests in sex offenders' rehabilitation and public protection.<sup>191</sup>

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the child's compliance and maintaining the child's secrecy to avoid disclosure. This process serves to strengthen the offender's abusive pattern, as it may be used as a means of justifying or denying their actions.

Samantha Craven et al., *Sexual Grooming of Children: Review of Literature and Theoretical Considerations*, 12 J. SEXUAL AGGRESSION 287, 297 (2006). Serial sex offenders move from community to community, hand-picking not only children to groom, but their families as well. Once a family completely trusts the offender, even when suspicions arise, the offender can easily quell the family by pointing back to that trust. See SALTER, *supra* note 30, at 42-44.

183. Kendall, *supra* note 179, at 1312; see generally FLOWERS, *supra* note 29, at 106-08 (distinguishing preferential child molesters, who are sexually attracted to children, from situational child molesters, who are not attracted to children).

184. Kendall, *supra* note 179, at 1312.

185. See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident . . . that a [s]tate's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)).

186. Kim English et al., *Community Containment of Sex Offender Risk: A Promising Approach*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY, *supra* note 33, at 265, 267.

187. See Shirley Jülich, *Stockholm Syndrome and Child Sexual Abuse*, 14 J. CHILD SEXUAL ABUSE 107, 114, 117 (2005).

188. *Id.* at 116, 117.

189. See *Boykin v. Thaler*, No. H-06-3291, 2009 WL 3448176, at \*4 (S.D. Tex. Oct. 26, 2009).

190. *United States v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009).

191. See Emily Brant, Comment, *Sentencing "Cybersex Offenders": Individual Offenders*



When this conflict arises, political pressure may influence the government to severely restrict sex offenders to promote public safety, but government restrictions on sex offenders should not preclude rehabilitation.<sup>192</sup>

*B. Sex Offenders' Interests in Using Public Library Materials*

Libraries possess resources that allow offenders to become more knowledgeable, insightful, and productive in civic activities.<sup>193</sup> The corrections system expects offenders on parole or probation to secure and retain employment, often without job placement assistance prior to prison release.<sup>194</sup> Securing employment significantly reduces the likelihood that an offender will recidivate,<sup>195</sup> but without access to employment information, many offenders experience difficulty finding a job.<sup>196</sup> Public libraries can help offenders achieve this rehabilitation objective through services many libraries already provide, such as access to job advertisements, online applications, and workshops on résumés and cover letters.<sup>197</sup>

Libraries also allow sex offenders to become more active citizens by providing access to information on how to engage in government processes.<sup>198</sup> Access to a wide variety of materials, especially citizenship and democratic process related materials, furthers the First Amendment goal of "producing an informed public capable of conducting its own affairs."<sup>199</sup> Additionally, access to information is becoming more a need than a luxury<sup>200</sup> as more information

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*Require Individualized Conditions When Courts Restrict Their Computer Use and Internet Access*, 58 CATH. U. L. REV. 779, 803 (2009).

192. *See id.*

193. *See, e.g.*, Mark Edmundson, *Against Readings*, CHRON. REV., Apr. 24, 2009, at B7 (discussing how Malcolm X taught himself how to read by copying down the dictionary while he was in prison).

194. Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prisoner Release*, 13 GEO. J. ON POVERTY L. & POL'Y 219, 222 (2006).

195. *See id.*

196. *Id.*

197. *See, e.g.*, *Technology @ Your Library*, KALAMAZOO PUB. LIBRARY, <http://www.kpl.gov/computer-training/> (last modified June 4, 2011).

198. *See* Anne Goulding, *Libraries and Social Capital*, 36 J. LIBRARIANSHIP & INFO. SCI. 3, 5 (2004).

199. *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 392 (1969).

200. *See* Peter Hernon & Harold C. Relyea, *Information Policy*, in *ENCYCLOPEDIA OF LIBRARY & INFORMATION SCIENCE* 1300, 1300 (Miriam A. Drake ed., 2d ed. 2003) ("Information is 'essential to our existence' and assumes a 'life of its own.'"). Many programs seek to assist needy individuals, but they must be able to learn about these programs to take advantage of them. *See, e.g.*, *Access to Information May Mean More Cash for College*, SCHOLARSHIPS.COM, <http://www.scholarships.com/financial-aid/financial-aid-information/access-to-information-may-mean-more-cash-for-college/> (last visited June 4, 2011).

becomes available only online.<sup>201</sup> Materially poor individuals experience great difficulty accessing this information.<sup>202</sup> States recognize the importance of providing Internet access to all people and have equipped public libraries with additional electronic resources in an attempt to compensate for the uneven distribution of information resources.<sup>203</sup>

Although individuals concerned about unequal access to information currently focus on Internet availability, access to all types of media is important. Individuals with a more extensive knowledge base are more likely to absorb additional information in the future.<sup>204</sup> This initial knowledge base functions as a schema individuals use to filter new information and subconsciously decide to ignore or commit to memory each new idea.<sup>205</sup> Therefore, individuals with a larger knowledge base are more likely to recognize a greater percentage of the new knowledge they encounter and incorporate more new ideas.<sup>206</sup> Conversely, individuals with a limited knowledge base are less likely to recognize new information and will reject a greater percentage of new ideas, maintaining information poverty.<sup>207</sup>

Therefore, an information gap between the “information-rich” and “information-poor” grows dramatically as those with a larger knowledge base accumulate more knowledge at faster rates and those without a substantial knowledge base fail to accumulate the additional knowledge they encounter.<sup>208</sup> This information gap impedes communication and interaction with others, and information-poor individuals may not be able to make informed decisions if they vote. Ultimately, denying sex offenders access to library resources is likely to prevent their full rehabilitation, future active citizenship, and self-improvement.

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201. Rebecca Carrier, *On the Electronic Information Frontier: Training the Information-Poor in an Age of Unequal Access*, in CYBERGHETTO OR CYBERUTOPIA?: RACE, CLASS, AND GENDER ON THE INTERNET 153 (Bosah Ebo ed., 1998) (“As information takes an even greater role in determining social class, those who have the greatest abilities to retrieve and process the most important information will be separated from other members of society.”).

202. Jutta Haider & David Bawden, *Conceptions of “Information Poverty” in LIS: A Discourse Analysis*, 63 J. DOCUMENTATION 534, 546 (2007).

203. Carrier, *supra* note 201, at 154; *see also* Elizabeth Anne Buchanan, *Ethical Transformations in a Global Information Age*, 13 TECH. SERVS. Q. 23, 30 (1996) (“[O]nly [in] the United States . . . will the information age have its own form of ‘information welfare,’ where some can access the Internet from public places and be given an information subsidy.”).

204. *See* Carrier, *supra* note 201, at 157.

205. *Id.* at 157-58.

206. *Id.*

207. *Id.* at 158; *see also* Reijo Savolainen, *Everyday Life Information Seeking*, in ENCYCLOPEDIA OF LIBRARY & INFORMATION SCIENCE 1780, 1783 (3d ed. 2010) (“[S]ituational relevance is instrumental in explaining information poverty. Potentially useful information will be not used because people living in a small world do not see a generalized value of sources provided by outsiders intended to respond to their situation. The source is ignored because it is not legitimized by ‘contextual others.’”).

208. *See* Carrier, *supra* note 201, at 157-58.



#### IV. FIRST AMENDMENT FREEDOM OF SPEECH

The First Amendment reads, in relevant part, "Congress shall make no law . . . abridging the freedom of speech."<sup>209</sup> However, this amendment protects more than one's ability to speak.<sup>210</sup> One of the many additional activities it protects is access to a public library.<sup>211</sup> Generally, restrictions on behavior that are not related to the expression of a particular message will be upheld, but if a restriction is not sufficiently tailored to the government's interest, it will be overturned.<sup>212</sup>

##### *A. Is Protected Expression Involved?*

First Amendment free speech protection includes many forms of expression other than spoken words.<sup>213</sup> The Supreme Court has upheld flag burning<sup>214</sup> and students' display of black armbands to protest the Vietnam War<sup>215</sup> as protected expressive activity. The Court has even deemed reading obscene material a protected activity if it took place in the privacy of an individual's home.<sup>216</sup> However, not all actions with an expressive element enjoy First Amendment protection, as shown in *Doe v. City of Lafayette*.<sup>217</sup> In this case, the Seventh Circuit rejected a sex offender's argument that his banishment from city parks punished him solely for thoughts about molesting children and held that the offender had not shown that this restriction prevented his engagement in expressive conduct.<sup>218</sup> Therefore, it appears that if the purpose is to express a viewpoint, courts are more likely to protect the expression. However, if the expression is merely incidental to conduct, courts may refuse to protect the expression.

##### *B. Right to Access Public Libraries*

The Third Circuit has held that the First Amendment "includes the right to some level of access to a public library, the quintessential locus of the receipt of information."<sup>219</sup> This right has foundations in freedom of speech and the

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209. U.S. CONST. amend. I.

210. *See Doe v. City of Lafayette*, 377 F.3d 757, 763 (7th Cir. 2004) (en banc).

211. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992).

212. *See United States v. Bender*, 566 F.3d 748, 753 (8th Cir. 2009).

213. *City of Lafayette*, 377 F.3d at 763.

214. *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

215. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

216. *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

217. *See City of Lafayette*, 377 F.3d. at 767.

218. *Id.* at 761, 764.

219. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992). Sex offenders also have a right to access public libraries under the American Library Association's Library Bill of Rights, which—although it does not have the authority to grant legal rights—provides, "A person's right to use a library should not be denied or abridged because of origin, age, background, or

associated right to receive information.<sup>220</sup> In *Red Lion Broadcasting Co. v. FCC*,<sup>221</sup> the Supreme Court announced that a government actor cannot abridge “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.”<sup>222</sup> This prohibition also applies to libraries because “[t]he library . . . is in a sense a perfect incarnation of ‘the marketplace of ideas.’”<sup>223</sup>

1. *Right to Receive Information.*—First Amendment jurisprudence encourages the presentation of multiple viewpoints regarding controversial topics.<sup>224</sup> In *Griswold v. Connecticut*,<sup>225</sup> the Supreme Court clearly expressed that “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.”<sup>226</sup> The *Griswold* Court also recognized a right to read as part of the freedom of speech.<sup>227</sup> Peripheral rights, such as the ability to research, are necessary for individuals to meaningfully exercise their free speech rights in the “marketplace of ideas.”<sup>228</sup>

When faced with a free speech challenge, courts must determine the applicable level of scrutiny by determining whether the restriction is content-based or content-neutral.<sup>229</sup> A content-based restriction is one that “restrict[s] expression because of its message, its ideas, its subject matter, or its content.”<sup>230</sup> This type of speech restriction must be “narrowly drawn to effectuate a compelling state interest”<sup>231</sup> to be upheld against a First Amendment challenge. Alternatively, a content-neutral restriction is “justified without reference to the content of the regulated speech.”<sup>232</sup> These restrictions survive a First Amendment challenge provided that “they are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”<sup>233</sup>

2. *How Far Does the Right to Access Public Libraries Extend?*—Although individuals hold the right to some public library access, the Constitution allows

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views.” AM. LIBRARY ASS’N, LIBRARY BILL OF RIGHTS (1948), available at <http://www.ala.org/ala/issuesadvocacy/intfreedom/librarybill/index.cfm>.

220. See *Kreimer*, 958 F.2d at 1255.

221. 395 U.S. 367 (1969).

222. *Id.* at 390.

223. Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141, 1221 (2008).

224. See *Red Lion*, 395 U.S. at 383-84.

225. 381 U.S. 479 (1965).

226. *Id.* at 482.

227. *Id.*

228. See *id.* at 483.

229. *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring).

230. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

231. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (citation omitted).

232. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

233. *Id.*



library policies to define acceptable library patron behavior and hygiene, even if policy violations result in expulsion from the library.<sup>234</sup> This acknowledgement of libraries' ability to regulate library behavior within the confines of the First Amendment recognizes libraries' significant interest in providing the safest experience for library patrons.<sup>235</sup> For example, a library can require patrons to wear shoes while using library facilities.<sup>236</sup>

Revocation of library privileges is also constitutionally permissible if a patron physically punishes other patrons who misbehave in the library.<sup>237</sup> This type of behavior can be regulated because the First Amendment protects only library-related behavior such as reading and researching.<sup>238</sup> Additionally, if a library employee asks a patron who has violated behavior or hygiene policies to leave, banishment from the library is not indefinite; the patron may return when he or she complies with library policies.<sup>239</sup>

Courts have recognized that some library, Internet, and computer use restrictions are unreasonable. In *United States v. Bender*,<sup>240</sup> the Eighth Circuit held that a condition of supervised release that prohibited a sex offender from entering any library lacked sufficient tailoring—even though his offense involved a library computer—because “libraries are essential for research and learning.”<sup>241</sup> The Eighth Circuit had previously rejected a complete computer and Internet ban in *United States v. Crume*.<sup>242</sup> There, the court reasoned that the prohibition of computer and Internet use lacked sufficient tailoring to Crume’s offense.<sup>243</sup> Although Crume had committed a grievous sexual crime, only an additional child pornography possession charge involved a computer.<sup>244</sup> The court determined that prohibiting Crume from accessing certain types of websites, as opposed to the entire Internet, would be a more appropriately tailored rule.<sup>245</sup>

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234. See *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1270 (3d Cir. 1992). But cf. *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 70, 77-79 (D.D.C. 2001) (holding that a policy allowing staff to deny library access to individuals whose appearance was “objectionable (barefooted, bare-chested, body odor, filthy clothing, etc.)” was vague and insufficiently tailored to the government’s interest); *Brinkmeier v. City of Freeport*, No. 93-C-20039, 1993 WL 248201, at \*1, \*5-6 (N.D. Ill. July 2, 1993) (holding that an unwritten library policy excluding individuals who harass or intimidate other patrons or library employees is too broad and an unreasonable limitation on First Amendment rights).

235. *Kreimer*, 958 F.2d at 1246.

236. *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 596 (6th Cir. 2003).

237. *Hill v. Derrick*, No. 4:05-CV-1229, 2006 WL 1620226, at \*9 (M.D. Pa. June 8, 2006) *aff’d*, 240 Fed. App’x 935 (3d Cir. 2007).

238. See *Kreimer*, 958 F.2d at 1262.

239. *Id.* at 1264.

240. 566 F.3d 748 (8th Cir. 2009).

241. *Id.* at 753.

242. 422 F.3d 728, 733 (8th Cir. 2005).

243. *Id.*

244. *Id.*

245. *Id.*

In *United States v. Peterson*,<sup>246</sup> the Second Circuit also rejected a complete prohibition of computer equipment ownership and Internet access as a release condition for an individual who was convicted of bank larceny and also had a prior incest conviction.<sup>247</sup> The court held that the release conditions were not reasonably related to the offender's convictions or the government's interest in preventing the offender from recidivating.<sup>248</sup> Although the offender consumed pornography, the court recognized this as a legal activity that did not justify denying him access to online newspapers, books, and magazines.<sup>249</sup> Ultimately, these cases recognize that some regulation of sex offenders' activities is reasonable based on their past actions, but restrictions should not be any more excessive than necessary to prevent recidivism.<sup>250</sup>

However, other circuits are more willing to uphold Internet bans for sex offenders.<sup>251</sup> The Third Circuit, in *United States v. Thielemann*,<sup>252</sup> upheld a condition of release prohibiting Thielemann from "own[ing] or operat[ing] a personal computer with Internet access in a home or at any other location, including employment, without prior written approval of the Probation Office."<sup>253</sup> Although Thielemann pled guilty to one count of receiving child pornography,<sup>254</sup> his criminal activity was more malign:

Thielemann offered Phillips \$20 to turn on his web cam and place the [eight-year-old female] victim on Phillips's lap so the victim would see Thielemann's exposed penis. Phillips complied. Thielemann then offered Phillips \$100 to rub the victim's genitals and lift up her skirt, which Phillips also did. . . . Thielemann then asked Phillips to masturbate

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246. 248 F.3d 79 (2d Cir. 2001).

247. *Id.* at 80-82.

248. *Id.* at 82-83.

249. *Id.* at 83.

250. See also *Whitney v. California*, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

251.

The Fourth and Fifth Circuits have affirmed complete, immutable bans on computer and internet use. The Ninth, Eleventh, and D.C. Circuits have upheld internet prohibitions that allow for individual use permissions from probation officers or that do not expressly ban internet use in the course of employment. The Third, Eighth, and Tenth Circuits have alternatively affirmed and struck down various types of internet prohibitions.

*Criminal Law—Supervised Release—Third Circuit Approves Decade-Long Internet Ban for Sex Offender.*—*United States v. Thielemann*, 575 F.3d 265 (3d Cir. 2009), 123 HARV. L. REV. 776, 781 (2010) (internal citations omitted).

252. 575 F.3d 265 (3d Cir. 2009).

253. *Id.* at 270.

254. *Id.* at 269.



with the victim on his lap . . . .<sup>255</sup>

After considering the defendant's conduct, the Third Circuit concluded that the reason for the Internet restriction was "self-evident."<sup>256</sup> Thielemann's offenses were directly linked to the Internet, and the government wanted to protect other young children.<sup>257</sup> The court noted that the ban's duration was important. This ban from the Internet for ten years<sup>258</sup> was considered reasonable, but the Third Circuit had previously rejected a lifelong Internet ban as insufficiently tailored.<sup>259</sup> Determining what is a reasonable condition of release is fact-dependent; a one-size-fits-all approach is not appropriate when balancing offenders' liberty interests and public safety.

3. *Bans of Sex Offenders from Public Libraries.*—The United States District Court for the District of New Mexico considered Albuquerque's ban of sex offenders from Albuquerque public libraries in *Doe v. City of Albuquerque*.<sup>260</sup> The court acknowledged that the right to receive information was a constitutional right as recognized by the Supreme Court in *Martin v. City of Struthers*,<sup>261</sup> *Stanley v. Georgia*,<sup>262</sup> and *Lamont v. Postmaster General of the United States*.<sup>263</sup> The court also recognized that *Kreimer v. Bureau of Police for the Town of Morristown*<sup>264</sup> established the right to some access to a public library.<sup>265</sup> Furthermore, the court acknowledged that reasonable time, place, and manner restrictions—such as the requirement that patrons wear shoes in *Neinast v. Board of Trustees of Columbus Metropolitan Library*<sup>266</sup>—were acceptable in part because they did not directly affect the right to receive information,<sup>267</sup> but even content-neutral restrictions needed to be narrowly tailored to a significant government interest.<sup>268</sup> The court deemed this especially true when regulations restrict certain patrons, such as the homeless, from "engaging in any conduct within, or use of, the library."<sup>269</sup> However, the court stopped short of holding that public library access is a fundamental right.<sup>270</sup>

Next, the court determined the appropriate level of scrutiny for the forum

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255. *Id.* at 268.

256. *Id.* at 278.

257. *Id.*

258. *Id.* at 267.

259. *Id.* at 278 (citing *United States v. Voelker*, 489 F.3d 139, 144-46 (3d Cir. 2007)).

260. No. 08-cv-01041-MCA-LFG (D.N.M. Mar. 31, 2010).

261. 319 U.S. 141, 143 (1943).

262. 394 U.S. 557, 564 (1969).

263. 381 U.S. 301, 307 (1965).

264. 958 F.2d 1242 (3d Cir. 1992).

265. *Doe*, No. 08-cv-01041-MCA-LFG at 13.

266. 346 F.3d 585, 589 (6th Cir. 2003).

267. *Doe*, No. 08-cv-01041-MCA-LFG at 20.

268. *Id.* at 19.

269. *Id.*

270. *Id.* at 21.

implicated.<sup>271</sup> Because public libraries are designated public fora<sup>272</sup> and the regulation was content-neutral, the court required the regulation to be “narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of ideas.”<sup>273</sup> The City of Albuquerque chose not to state for the record the interest it sought to protect through this regulation.<sup>274</sup> However, the city did note that there was an increase both in the number of young teens and the number of adult males between the hours of 3:00 and 5:00 P.M. on weekdays.<sup>275</sup> The court therefore assumed that the city’s interest was protecting children.<sup>276</sup>

Ultimately, the court held that Albuquerque’s ban was not narrowly tailored and did not leave open ample alternative channels for communication.<sup>277</sup> The court distinguished Albuquerque’s ban from *Kreimer* and *Neinast*’s acceptable restrictions, where once patrons complied with the rules, they could regain library access.<sup>278</sup> Instead, Albuquerque’s ban resembled the *Armstrong* restriction, preventing certain kinds of patrons from engaging in any First Amendment activities inside the library.<sup>279</sup> The specific concern was adult male presence from 3:00 to 5:00 P.M., yet the ban of sex offenders was effective for all operating hours.<sup>280</sup> Because sex offender status cannot be easily changed by donning appropriate attire or improving hygiene, the court held that there were no alternative channels for communication.<sup>281</sup> Access to the University of New Mexico’s library was not considered an alternative channel for communication because the university’s collection did not provide as many popular works as the public library, and patrons had to pay for university library privileges.<sup>282</sup> Because the Albuquerque ban was not narrowly tailored and did not leave open alternative channels for communication, the court held the executive instruction unconstitutional.<sup>283</sup>

## V. RECOMMENDATIONS

Protecting children should be a high government priority, and further action is necessary to prevent future sex crimes. To establish child protection as a true

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271. *Id.*

272. *Id.* at 23.

273. *Id.* at 25 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

274. *Id.* at 26.

275. *Id.*

276. *Id.* at 27.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 28.

281. *Id.* at 29.

282. *Id.* at 30-31.

283. *Id.* at 42.



priority, governments must take proactive steps requiring time, human labor, and funds. The current strategy of creating blanket bans not only violates sex offenders' rights, but is also difficult to enforce.<sup>284</sup> However, less speech-restrictive alternatives exist that could limit the risk posed by sex offenders. Sex offenders' Internet activities on public library computers could be restricted through stronger filters; in turn, those restrictions could be enforced by monitoring electronic logs to ensure that sex offenders are not accessing prohibited websites. In addition, security guards could monitor library activity and ensure all patrons' compliance with library building use rules. By implementing strategies that closely target society's concerns regarding sex offenders, the physical safety of all library patrons will be improved.

*A. Courts Should Hold the Remaining Bans of Sex Offenders from Public Libraries Unconstitutional*

The remaining legislative bans suffer from many of the same problems as the Albuquerque ban. All prohibit sex offenders from being present on library property;<sup>285</sup> therefore, they all prevent a certain type of person from accessing the library. These restrictions are also based on a status individuals cannot change in order to be able to access the library. Because all of these content-neutral bans<sup>286</sup> happen to involve public libraries, they also implicate designated public fora, and the appropriate scrutiny should require the regulation to be "narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of ideas," just as in *Doe v. City of Albuquerque*.<sup>287</sup>

Bans of sex offenders from public libraries exemplify an increasing body of law where a severe solution is deemed necessary to alleviate an overestimated problem.<sup>288</sup> When a restriction addresses a statistically unlikely danger, like a sex

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284. See Amy Erickson, *New Library Law Reads: Sex Offenders Stay Out*, LE MARS SENTINEL (July 7, 2009), [http://www.accessola.com/olba/bins/content\\_page.asp?cid=66-827-3301](http://www.accessola.com/olba/bins/content_page.asp?cid=66-827-3301) (noting that the Iowa statute does not specify how library personnel can distinguish sex offenders from other patrons entering the library); Kris Todd, *Library Considers Sex Offender Law Impact*, DAILY REP. (June 16, 2009), <http://www.spencerdailyreporter.com/story/1547582.html> (quoting the Spencer, Iowa city attorney: "You don't have to enforce this law. You don't have to prepare a listing of these offenders and make sure they never set foot in the library.").

285. IOWA CODE ANN. § 692A.113(1)(f) (West, Westlaw through May 19 of 2011 Reg. Sess.); METHUEN, MASS., MUN. CODE ch. 27, §§ 1, 3 (2008); NEW BEDFORD, MASS., CODE § 17-26 (2008); ROWAN CNTY., N.C., CODE § 15-3 (2008); STEPHENVILLE, TEX., CODE § 130.81-.82 (2007).

286. These bans are content-neutral because they prohibit offenders' presence in many places where expressive activities do not occur, such as parks and playgrounds. See *supra* Part II.A.

287. *Doe*, No. 08-cv-01041-MCA-LFG at 25 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

288. See R. George Wright, *Content-Based and Content-Neutral Regulations of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 347 (2006) ("In an age of official insecurity and anxiety, the most difficult constitutional problem may not be controlling arbitrariness

offender attacking a previously unknown child in a public library,<sup>289</sup> courts should consider the potential harm—not the hype—and apply a more stringent level of scrutiny to ensure that the restriction is appropriate.<sup>290</sup> Ultimately, to be held constitutional, the restriction should be very closely tailored to the governmental interest.

The state interest asserted to justify these bans is usually a general one, such as protecting children,<sup>291</sup> but there are usually three common concerns. First, society seeks to protect children's physical safety inside libraries.<sup>292</sup> Second, legislators seek to prevent the exposure of children to inappropriate behavior and images.<sup>293</sup> Third, concerned individuals seek to prevent sex offenders from contacting minors via the Internet.

The government has a compelling interest in protecting children from physical harm,<sup>294</sup> but the fact that some risk is associated with a speech activity is not sufficient for a First Amendment exception.<sup>295</sup> In this case, the risk is associated with sex offenders' physical presence, but that presence in the library is necessary for the sex offender to hear and engage in further protected speech. In *Marsh v. Alabama*,<sup>296</sup> the Supreme Court held an Alabama statute criminalizing the conduct of entering or remaining "on the premises of another after having been warned not to do so" unconstitutional as applied to an individual who sought to distribute religious literature.<sup>297</sup> Simply entering another's premises does not involve expressive activity, just as entering the library does not. However, just as the plaintiff in *Marsh* sought entry to others' property to engage in protected activities, sex offenders seek entry to the library to exercise their right to receive information.

Even though these legislative bans are content-neutral, they are unconstitutional because they lack sufficient tailoring to the government's interest in child protection. The prohibition of sex offenders from libraries is not

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in permitting, but compensating for a chronic tendency to overestimate the likelihood of any damage to public security from public exercises of freedom of speech.").

289. Of 224 recidivist sex offenders' offenses studied by the Minnesota Department of Corrections, only six (less than 3%) took place in an "interior public location." MINN. DEP'T OF CORR., *supra* note 62, at 12.

290. See Wright, *supra* note 288, at 348.

291. See METHUEN, MASS., MUN. CODE ch. 27 (2008); STEPHENVILLE, TEX., CODE § 130.80 (2007); Rowan Cnty. Apr. 21, 2008 Minutes, *supra* note 111, at 19.

292. See Szaniszlo, *supra* note 122 (implying that the City of New Bedford sought to prevent additional rapes on public property).

293. See Encarnacao, *supra* note 113 (citing exposure of teenagers to adult men masturbating while viewing pornography on a library computer as a concern).

294. New York v. Ferber, 458 U.S. 747, 756-57 (1982).

295. See Martin v. City of Struthers, 319 U.S. 141, 145 (1943) (acknowledging the risks of door-to-door pamphlet distribution, including nuisance and subsequent theft from homes, but concluding that the importance of the First Amendment activity outweighed the risks).

296. 326 U.S. 501 (1946).

297. *Id.* at 504, 509.



comparable to *Kreimer*, where an individual's body odor bothered other patrons.<sup>298</sup> The bans assume that a sex offender's mere presence threatens child safety because the sex offender may commit a violent act, but children can be safe even if sex offenders are present. Most sex offenders do not offend against children unknown to them,<sup>299</sup> so this risk, like the risk of nuisance or theft in *Martin*, is not sufficiently probable to justify denying First Amendment rights to a broad class of citizens. There are also less speech-restrictive ways to protect children in the library, such as hiring security guards or installing cameras.<sup>300</sup> Even a narrower ban of sex offenders from the library's children's area would be a more tailored response than comprehensive library bans, which include areas children do not visit.<sup>301</sup>

An overinclusive restriction, or one that "restricts a significant amount of speech that doesn't implicate the government interest,"<sup>302</sup> is not narrowly tailored. Because sex offenders include a variety of individuals<sup>303</sup> who have committed a wide range of acts,<sup>304</sup> it is unrealistic to assume that all sex offenders will sexually

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298. *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1247 (3d Cir. 1992).

299. See *SALTER*, *supra* note 30, at 235-40 (categorizing attacks by strangers as low-risk and noting that if they do occur, the stranger has often been stalking the child for a significant period of time); Lenore M.J. Simon, *Matching Legal Policies with Known Offenders*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY*, *supra* note 33, at 149-50 (noting that strangers commit less than 10% of sex crimes against children); Merriam & Salkin, *supra* note 60, at 98 (noting that usually, "it is not strangers who seek out victims at schoolyards, playgrounds, and bus stops. While the most shocking of sex crimes involves the abduction of a young child—a complete stranger to the sex offender—who is then sexually abused and murdered, statistically this is an outlier.").

300. See *infra* Part V.D.

301. Libraries should also provide a separate computer area for children and families. This would help prevent assault of children while inattentive caretakers are on the computer. See Szaniszló, *supra* note 122 (reporting that a six-year-old boy was raped in the stacks while his mother was on a computer a few feet away); AM. LIBRARY ASS'N, *supra* note 164 (describing an incident at the Des Moines Public Library where a sex offender took a twenty-month-old-girl while her babysitter was on the computer).

302. EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 220 (3d ed. 2008).

303.

Sex offenders are not all alike. . . . Some commit violent sexual rapes and assaults on strangers. Others commit sex crimes against members of their own families. . . . And, there are other offenders who engaged in unusual sexual activity, such as exposing themselves or voyeurism. To consider all of these different types of offenders and their offenses under a single descriptive category of "sex offenders" is misguided.

LAFOND, *supra* note 22, at 43-44.

304. A nineteen-year-old male who engages in consensual sex with his fifteen-year-old girlfriend and an individual who abuses over two hundred children are currently indistinguishable in some jurisdictions when identified with the label of "sex offender." Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*,

abuse a child if allowed in the library. Although some of the bans are limited to sex offenders whose victims were minors,<sup>305</sup> or to higher level offenders,<sup>306</sup> they still encompass many individuals who probably do not pose a significant danger to children in the library. Even individuals who sexually abused children in the past are unlikely to be sufficiently uninhibited to molest a child in a public place.<sup>307</sup> Furthermore, although SVPs cannot control their behavior, these individuals are also unlikely to assault a child in a public library because they are usually placed in inpatient treatment facilities and do not travel freely in the community.<sup>308</sup> By distinguishing among different levels of sex offenders actually present in the community, bans could be more tailored by varying the severity of restrictions according to the risks each level of offenders presents.

Nevertheless, denial of some library activities—such as access to online pornography—might further the government’s compelling interest in child protection. Some sex offenders view pornography as part of their offense preparation.<sup>309</sup> For many offenders, “pornography affects the offense cycle by strengthening cognitive distortions, reducing inhibitions, and reinforcing deviant sexual arousal.”<sup>310</sup> However, a more narrow restriction of sex offenders’ Internet privileges would be sufficient to address this concern.<sup>311</sup>

The government also has a legitimate interest in preventing sex offenders’ communication with children.<sup>312</sup> Some sex offenders use the Internet to engage in sexual conversations with minors, and these conversations present public safety concerns.<sup>313</sup>

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78 UMKC L. REV. 241, 243-44 (2009).

305. IOWA CODE ANN. § 692A.113 (West, Westlaw through May 19 of 2011 Reg. Sess.); STEPHENVILLE, TEX., CODE § 130.82 (2007).

306. METHUEN, MASS., MUN. CODE ch. 27, § 1 (2008); NEW BEDFORD, MASS., CODE § 17-26(1)(a)(ii)(a) (2008).

307. *But see* Eric Pierce, *Man Arrested for Sexual Assaults at Library*, DOWNEY PATRIOT (Apr. 23, 2010), [http://www.thedowneypatriot.com/view/full\\_story/7179860/article-Man-arrested-for-sexual-assaults-at-library?instance=pierce\\_left\\_column](http://www.thedowneypatriot.com/view/full_story/7179860/article-Man-arrested-for-sexual-assaults-at-library?instance=pierce_left_column).

308. Hall, *supra* note 25, at 186.

309. Brian W. McKay, Note, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 207 (2003).

310. *Id.* at 206; *see also* Abby Simons, *Library Sex Offender Incident Fuels Internet Filter Push*, DES MOINES REG., Nov. 21, 2005 (on file with author) (reporting that a sex offender who allegedly molested a child in the library restroom had used library computers to view pornography).

311. *See infra* Part V.B.

312. *See* BERKMAN CTR. FOR INTERNET & SOC’Y, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES 4 (Dec. 31, 2008), *available at* [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF\\_Final\\_Report-Executive\\_Summary.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report-Executive_Summary.pdf) (“Sexual predation on minors by adults, both online and offline, remains a concern.”).

313. McKay, *supra* note 309, at 210; *see also* BERKMAN CTR. FOR INTERNET & SOC’Y, *supra* note 312, at 4 (noting that in many cases where adults solicit minors, the minors were “aware that they were meeting an adult male for the purpose of engaging in sexual activity”). However, other findings include that minors solicit sex from each other more frequently than adults solicit minors,



Bans of sex offenders from public libraries are not narrowly tailored to further the government interest in protecting children from sex offenders on the Internet because they are underinclusive.<sup>314</sup> The library bans do not prevent sex offenders' Internet access and communication with children at other locations, such as sex offenders' homes. The bans are also overinclusive; they prevent sex offenders from engaging in protected First Amendment activities, including reading, that are unrelated to the state interest in protecting children.

Furthermore, a complete ban of sex offenders is also not narrowly tailored to the concern that children will be exposed to inappropriate behavior and images. It is possible that an individual who is not a registered sex offender might look at pornography on a computer and masturbate in the library. Although bans of sex offenders from public libraries may limit their access to pornography to use in grooming potential victims,<sup>315</sup> a blanket ban from the library is not necessary to further this goal. Stricter filters and monitoring would be sufficient.<sup>316</sup> Therefore, the bans lack narrow tailoring.

Governmental bodies may attempt to justify bans of sex offenders from libraries by arguing that alternative avenues to information exist, such as television and radio.<sup>317</sup> However, unlike public library computers, these media do not allow offenders the same opportunities—namely, the ability to apply for employment or other programs online. Although these legislative bans are content-neutral, they do not withstand the requisite scrutiny because they lack sufficient tailoring to the government's interests and fail to provide ample alternative channels for communication.

### *B. Subject Sex Offenders to More Stringent Internet Filters*

Libraries should apply more restrictive Internet filters to sex offenders' public library computer accounts to disable access to pornographic and social

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and that cyber-bullying is a much greater online threat than sexual solicitation. *Id.* Although these teen-created threats pose the greatest problems, it is highly unlikely that legislatures would deny Internet access to all individuals under the age of eighteen. The House of Representatives has, however, considered requiring schools and libraries receiving federal funding to prevent minors from accessing social networking sites via school and library computers. See Deleting Online Predators Act of 2007, H.R. 1120, 110th Cong. (2007).

314. Underinclusive restrictions fail "to restrict a significant amount of speech that harms the government interest to about the same degree as does the restricted speech." VOLOKH, *supra* note 302, at 221.

315. McKay, *supra* note 309, at 208.

316. See *infra* Part V.B-C.

317. But see *Schneider v. State*, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). Another problem is that some materials, such as local history archives and genealogy records, are available only at one library. See, e.g., *Genealogy Resources Available at Our Library*, TEX. STATE LIBRARY & ARCHIVES COMM'N, <http://www.tsl.state.tx.us/arc/genfirst.html> (last updated Mar. 31, 2011).

networking websites. Although this tactic still restricts speech, it does so only to the extent necessary to serve the governmental interest in child protection. This closer tailoring would allow such a library policy to survive a First Amendment challenge.

Internet filters have been previously challenged. In *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*,<sup>318</sup> the court held that blocking pornography via computer software was a content-based prior restraint on First Amendment activity.<sup>319</sup> The court held the mechanism unconstitutional because the library could not show that its interests in preventing sexual harassment and obstructing access to child pornography required blocking all pornography.<sup>320</sup>

However, an important distinction exists between *Mainstream Loudoun* and the proposed implementation of more stringent Internet filters for sex offenders. Specifically, the proposed filters would apply only to sex offenders, not all adults, as in *Mainstream Loudoun*. Evidence that pornography can trigger sex offenders to abuse children could be offered to support a carve-out from *Mainstream Loudoun*. Nevertheless, without substantial empirical evidence to prove a nexus between pornography and child molestation, a court will likely reject it. The Supreme Court has described the link between pornography and attacks as “contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.”<sup>321</sup> However, the Court provided this reasoning because sex offenders’ crimes should not prevent law-abiding citizens from consuming virtual child pornography.<sup>322</sup> If only sex offenders’ access were at issue, a court might be more willing to consider restrictions because they would be narrowly tailored to a government interest in preventing recidivism by convicted sex offenders.

A more recent case, *United States v. American Library Ass’n*,<sup>323</sup> supports public libraries’ use of Internet filters.<sup>324</sup> The Court held that the federal government could require public libraries receiving federal funds to use Internet filtering software to prevent patrons’ access to pornography.<sup>325</sup> However, the statute at issue—the Children’s Internet Protection Act<sup>326</sup>—allowed the filter to be disabled “to enable access for bona fide research or other lawful purposes.”<sup>327</sup> Other federal funding requirement statutes also allowed library employees to disable Internet filters for adults.<sup>328</sup> If sex offenders had a unique authorization connected to their usernames, an Internet system could be configured so that

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318. 24 F. Supp. 2d 552 (E.D. Va. 1998).

319. *Id.* at 570.

320. *Id.* at 566-67.

321. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 236 (2002).

322. *Id.*

323. 539 U.S. 194 (2003).

324. *Id.* at 214 (plurality opinion).

325. *Id.*

326. 20 U.S.C. § 9134(f) (2006).

327. *Id.* § 9134(f)(3).

328. *Am. Library Ass’n*, 539 U.S. at 201.



employees could not disable the filters. Although sex offenders usually are adults who would normally be allowed to have the filters disabled, the risk offenders pose to children on the Internet could be sufficient to justify limited access.

### C. Track Sex Offenders' Internet Viewing Trails

The most narrowly tailored solutions to sex offender computer use issues allow sex offenders to access email and informative websites but preclude access to pornography, social networking, and instant messaging websites.<sup>329</sup> Parole officers can enforce paroled sex offenders' computer and Internet use restrictions through unannounced inspections of sex offenders' computer hard drives.<sup>330</sup> Public libraries could employ an analogous strategy and use library employees to monitor lists of websites sex offenders access on library computers as tracked by spyware.<sup>331</sup> Although spyware's capabilities exceed the ability to track offenders' Internet browsing habits,<sup>332</sup> a simple review of the website addresses sex offenders visit would be sufficient to ensure that sex offenders have not accessed prohibited websites.

This method is the least invasive way to confirm that sex offenders are not visiting websites that might lead to further sexual abuse. Reviewing the list of website addresses an individual sex offender visits does not invade an offender's privacy any more than viewing an offender's record of checked-out books. Librarians' commitment to confidentiality<sup>333</sup> should safeguard sex offenders' privacy. However, there might be Fourth Amendment search implications.<sup>334</sup>

### D. Increase Surveillance of Library Patrons

Children harmed in public libraries are often accompanied by inattentive caretakers.<sup>335</sup> Consequently, employing more security staff would provide

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329. However, with Internet monitoring software such as Cyber Sentinel, which sends an e-mail to an offender's probation officer based on dangerous keywords, it might be possible to allow sex offenders to access social networking websites while keeping children safe. See John Schwartz, *Internet Leash Can Monitor Sex Offenders*, N.Y. TIMES, Dec. 31, 2001, at C4, available at <http://www.nytimes.com/2001/12/31/business/internet-leash-can-monitor-sex-offenders.html>.

330. *United States v. Freeman*, 316 F.3d 386, 392 (3d Cir. 2003).

331. See Rebecca Porter, *Who's Watching Your PC?*, TRIAL, Aug. 2004, at 44.

332. See *id.*

333. See *Code of Ethics of the American Library Association*, AM. LIBRARY ASS'N (Jan. 22, 2008), <http://www.ala.org/ala/issuesadvocacy/proethics/codeofethics/codeethics.cfm> ("We protect each library user's right to privacy and confidentiality with respect to information sought or received, and resources consulted, borrowed, acquired or transmitted.").

334. The Fourth Amendment provides "[t]he right of the people to be secure . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. For a general discussion of the Fourth Amendment implications of government surveillance of electronic communications, see Johnny Gilman, Comment, *Carnivore: The Uneasy Relationship Between the Fourth Amendment and Electronic Surveillance of Internet Communications*, 9 COMMLAW CONSPECTUS 111 (2001).

335. See sources cited *supra* note 301.

additional individuals to monitor threats to children's safety.<sup>336</sup> Uniformed security also serves as a deterrent to abuse; sex offenders would be aware of this surveillance, which would demonstrate the gravity of violations of the library's building use rules or state and federal laws. Unlike sex offender bans, this increase in security would serve as a preventative measure against not only known sex offenders, but also other individuals who have not been caught and identified as sex offenders. Additional security personnel would also be able to enforce library policies that are more targeted towards protecting children—for example, New Bedford Free Public Library's rule that young children be attended at all times and its prohibition of adults talking to minors if the adult is not the child's relative or caregiver.<sup>337</sup> The presence of security staff would also deter harm to all library patrons, regardless of whether a dangerous individual is a sex offender or not.<sup>338</sup>

Although there are many advantages to employing security staff, many libraries cannot afford current operating costs, let alone additional staff expenses.<sup>339</sup> Uniformed security guards serve as an additional deterrent because they are identifiable, but there may be less expensive alternatives that are just as effective. Libraries could encourage patrons to develop a "neighborhood watch" system in the library where patrons watch for suspicious patrons, especially in the vicinity of unattended children. Neighborhood watch programs have been found to be somewhat effective at reducing neighborhood crime<sup>340</sup> and could be effective in the library as well. Ultimately, children need to be monitored; this function can be performed by a paid employee or a concerned citizen. If libraries implemented a watch program, they could post "library watch" signs to inform

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336. Sometimes security guards are the only "eyes" watching out for children. An unaccompanied twelve-year-old girl with learning disabilities was sexually assaulted in a Michigan library while she was walking down an aisle. *See People v. Xiong*, No. 270213, 2007 WL 2781027, at \*1 (Mich. Ct. App. Sept. 25, 2007).

337. *Policy on Library Behavior*, NEWBEDFORD-MA.GOV, <http://www.newbedford-ma.gov/Library/policyBehavior.html> (last visited June 5, 2011). The Boston Public Library also limits the use of the library's children's rooms to "children, their parents, guardians, teachers, and caregivers, and people researching children's literature." *Safe Child Policy*, BOS. PUB. LIBRARY (Mar. 23, 2004), <http://www.bpl.org/general/policies/safechild.htm>.

338. Security guards are physical reminders of the consequences associated with wrongdoing. People are less likely to commit crimes in locations with security guards. *See Bank Robber: Security Guards Deter People Like Him*, ASSOC. PRESS NEWSWIREs, Mar. 10, 2008 (on file with author).

339. *See, e.g., Jennifer Buske, County Executive Offers Budget Full of Cuts; Proposals Include Reducing Staff, Closing Libraries and Halting Road and Park Projects*, WASH. POST, Feb. 18, 2010, at T17; Heather Scofield, *Libraries in Danger of Closing; Volusia Officials Look for Ways to Cut Costs*, DAYTONA BEACH NEWS J., Dec. 1, 2009, at 1C.

340. KATY HOLLOWAY ET AL., U.S. DEP'T OF JUSTICE OFFICE OF CMTY. ORIENTED POLICING SERVS., CRIME PREVENTION RESEARCH REVIEW NO. 3: DOES NEIGHBORHOOD WATCH REDUCE CRIME? 28 (2008), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e040825133-res-review3.pdf>.



individuals that others are watching. These signs would serve the notice function in lieu of a uniformed security guard.

Installing security cameras in low traffic and low visibility areas like the stacks might also act as a deterrent and would be less expensive than security staff. Although one might argue that this could chill speech by discouraging patrons from examining specific books, this is unlikely because the cameras would be positioned to capture the aisle where inappropriate activity might take place. It is unlikely that the zoom and angle would be sufficient to allow a person to identify the title of any book. Library personnel examining the footage would also have a duty to maintain patrons' confidentiality, just as they would for items checked out.<sup>341</sup>

### CONCLUSION

Sexual abuse of children is an indisputably horrendous offense, and offenders should be punished accordingly. However, sex offenders who have served their sentences remain United States citizens whose rights should be respected. First Amendment jurisprudence does not allow speech activities to be regulated in ways that are not closely tailored to achieving a significant governmental interest.<sup>342</sup> Protecting children from sexual abuse is a significant governmental interest; nevertheless, states and municipalities can achieve this interest more effectively through less speech-restrictive measures than blanket bans of sex offenders from public libraries. If libraries implemented increased electronic surveillance and employed security personnel, sex offenders could exercise the First Amendment rights that some governments currently deny, and society would receive more effective protection for child and adult library patrons alike.

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341. See *supra* note 333 and accompanying text.

342. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

# INDIANA’S “THREE STRIKES” INMATE LITIGATION LIMITATIONS: 2009 LEGISLATION DOES NOT HIT A HOME RUN

AMANDA L.B. MULROONY\*

## INTRODUCTION

In 2008, the Indiana Supreme Court struck down a law that precluded inmates from filing civil suits in state court if a court had deemed three past claims frivolous.<sup>1</sup> The majority found that the Three Strikes Law violated the open courts clause of the Indiana Constitution.<sup>2</sup> In response to the Indiana Supreme Court’s determination that the Three Strikes Law was unconstitutional as written, the Indiana General Assembly enacted a new version of the Three Strikes Law during its 2009 summer legislative session. The new version precludes an *indigent* inmate from further filings should he have brought three suits already deemed frivolous.<sup>3</sup>

Originally passed by the legislature in 2004, Indiana’s Frivolous Claims Law<sup>4</sup> and the Three Strikes Law<sup>5</sup> were designed to reduce litigation initiated by prison inmates. The Frivolous Claims Law requires an Indiana court to “review a complaint or petition filed by an offender” and dismiss it if the claim “(1) is frivolous; (2) is not a claim upon which relief may be granted; or (3) seeks monetary relief from a defendant who is immune from liability for such relief.”<sup>6</sup> The Three Strikes Law mandated that

[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under . . . [Indiana Code section 34-58-1-2, the Frivolous Claims Law], the offender may not file a new complaint or petition unless a court determines that the offender is in immediate danger of serious bodily injury.<sup>7</sup>

However, in *Smith v. Indiana Department of Correction*,<sup>8</sup> a 2008 split opinion, the Indiana Supreme Court determined that the Three Strikes Law was

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1. *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 808-10 (Ind. 2008).

2. IND. CONST. art. I, § 12.

3. IND. CODE § 34-10-1-3 (2011).

4. *Id.* § 34-58-1-2.

5. *Id.* § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified at IND. CODE. § 34-10-1-3).

6. *Id.* § 34-58-1-2(a).

7. *Id.* § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified by IND. CODE. § 34-10-1-3).

8. 883 N.E.2d 802 (Ind. 2008).



unconstitutional based on the open courts clause of the Indiana Constitution.<sup>9</sup> The open courts clause states, “All courts shall be open; and every person, for injury done to him . . . shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay.”<sup>10</sup> The majority in *Smith* held that as written, the Three Strikes Law was unconstitutional because the statute indiscriminately banned any inmate meeting the frivolous filing criteria from pursuing further claims.<sup>11</sup> The opinion explicitly cited six other states’ efforts to curb frivolous and frequent filings,<sup>12</sup> noting that “other courts have upheld other less stringent methods, such as requiring filing fees, to deter frivolous filing.”<sup>13</sup> The justices in the majority maintained that the legislature can impose “*conditions on the pursuit of a claim* in court”<sup>14</sup> and still comport with the open courts clause, but it cannot ban claims that are recognized by law.<sup>15</sup>

Consequently, during the 2009 summer legislative session, Indiana enacted a reworded version of the Three Strikes Law.<sup>16</sup> The law now states:

If an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under . . . [Indiana Code section 34-58-1-2, the Frivolous Claims Law], the offender may not file a new complaint or petition *as an indigent person* under this chapter, unless a court determines the offender is in immediate danger of serious bodily injury.<sup>17</sup>

Presumably because the *Smith* opinion suggested that other courts have upheld statutes requiring filing fees to deter frivolous filing,<sup>18</sup> the legislature reworded the statute to ban not all inmates, but specifically those who are indigent,<sup>19</sup> from filing repeated suits.<sup>20</sup> However, no state statutory scheme cited by the *Smith* court outright precludes a court from allowing a suit to proceed based on the

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9. *Id.* at 808-10.

10. IND. CONST. art. I, § 12.

11. *Smith*, 883 N.E.2d at 809.

12. *Id.* at 808-09 (citing statutes from California, Colorado, Delaware, Florida, Hawaii, and Texas).

13. *Id.* at 810.

14. *Id.* at 808 (emphasis added).

15. *Id.* at 810.

16. IND. CODE § 34-10-1-3 (2011).

17. *Id.* (emphasis added).

18. *Smith*, 883 N.E.2d at 810.

19. Litigants are able to petition Indiana courts to bring civil actions as indigents and be free from paying court fees or costs. IND. CODE § 33-37-3-2. An inmate who files as an indigent is required to pay a partial filing fee amounting to “twenty percent (20%) of the greater of: (1) the average monthly deposits to the offender’s account; or (2) the average monthly balance in the offender’s account; for the six (6) months immediately preceding the filing of the complaint or petition.” *Id.* § 33-37-3-3(b).

20. *Id.* § 34-10-1-3.

filer’s indigent status and history of previously filed frivolous suits.<sup>21</sup>

This Note explores the amended Three Strikes Law and discusses its effectiveness and its constitutionality under Indiana’s open courts clause. Throughout, the statutory schemes of the jurisdictions cited as exemplary in *Smith* will be used as a basis for comparison. Part I of this Note examines the historical background of open courts clauses found in state constitutions, as well as Indiana’s interpretation of its own clause.<sup>22</sup> Part II discusses in greater detail Indiana’s statutory scheme for limiting frivolous inmate suits, the Indiana Supreme Court’s determination that the original Three Strikes Law did not comport with the state’s open courts clause,<sup>23</sup> and the amended version of the Three Strikes Law enacted by the Indiana legislature in response to *Smith*.<sup>24</sup> Part III explores the six state and federal frameworks cited as examples within the *Smith* opinion, comparing and contrasting how these schemes address suit frivolity, inmate status, and indigent status, along with constitutional challenges made via applicable open courts clauses.<sup>25</sup> Part IV analyzes the 2009 version of Indiana’s Three Strikes Law<sup>26</sup> to determine if it is an effective law and if it now comports with the open courts clause of the Indiana Constitution.<sup>27</sup> Part IV also suggests that Indiana abandon the Three Strikes Law as a means to limit frivolous inmate suits and instead add to its Frivolous Claims Law by adopting provisions similar to those of states highlighted by the *Smith* opinion.

## I. OPEN COURTS CLAUSES—HISTORY AND INTERPRETATION

### A. History

Today, thirty-seven state constitutions contain open courts clauses.<sup>28</sup>

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21. See *Smith*, 883 N.E.2d at 808-09.

22. IND. CONST. art. I, § 12.

23. *Smith*, 883 N.E.2d at 803.

24. IND. CODE § 34-10-1-3.

25. Only four of the six states cited in *Smith* have open courts clauses in their state constitutions: (1) Colorado, COLO. CONST. art. II, § 6; (2) Delaware, DEL. CONST. art. I, § 9; (3) Florida, FLA. CONST. art. I, § 21; and (4) Texas, TEX. CONST. art. I, § 13. The constitutions of California and Hawaii do not contain open courts clauses.

26. IND. CODE § 34-10-1-3.

27. IND. CONST. art. I, § 12.

28. ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. BILL OF RIGHTS § 18; KY. CONST. BILL OF RIGHTS § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. BILL OF RIGHTS art. 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11;



Although the exact wording varies among these states,<sup>29</sup> all of the clauses proclaim in some fashion that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”<sup>30</sup> Other clauses similarly state that “[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”<sup>31</sup>

Open courts clauses were derived from Sir Edward Coke’s interpretation of Chapter 40 of the Magna Carta.<sup>32</sup> This document states, in translation, “[t]o no one will we sell, to no one will we refuse or delay, right or justice.”<sup>33</sup> Coke, writing in 1642 in *The Second Part of the Institutes of the Lawes of England*, wrote:

[E]very Subject of this Realm, for injury done to him in *bonis, terris, vel persona* [goods, lands, or person], . . . may take his remedy by the course of the Law, and have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.<sup>34</sup>

Coke’s writing, from which open courts clauses were derived,<sup>35</sup> focused on the independence of common law judges<sup>36</sup> and spoke out against “the sale of common-law justice through corruption.”<sup>37</sup> Jonathan Hoffman, a leading scholar on the history of open courts clauses,<sup>38</sup> suggests that open courts clauses are not meant to restrain a legislature’s properly enacted adjustments to substantive

VT. CONST. ch. I, art. 4, ch. II, § 28; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8; *see also* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992). Additionally, Arizona and New Mexico judiciaries have determined that the right to a remedy and open court exist in those states’ constitutions. *See id.*

29. Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005, 1005 n.1 (2001) [hereinafter Hoffman, *Questions Before Answers*]; Schuman, *supra* note 28, at 1201.

30. FLA. CONST. art. I, § 21.

31. TEX. CONST. art. I, § 13.

32. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995) [hereinafter Hoffman, *By the Course of the Law*]; Hoffman, *Questions Before Answers*, *supra* note 29, at 1006.

33. Hoffman, *By the Course of the Law*, *supra* note 32, at 1286 n.38 (quoting WILLIAM S. MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395* (2d ed. 1914)). Hoffman explains that the “due course of law” language found in open courts clauses is distinguished from the concept of due process because the terms stemmed from different chapters of the Magna Carta. *Id.* at 1289.

34. *Id.* at 1294 n.96 (quoting SIR EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND* 55-56 (photo. reprint 1979) (1642) (emphasis added)).

35. *Id.* at 1281; Hoffman, *Questions Before Answers*, *supra* note 29, at 1006.

36. Hoffman, *By the Course of the Law*, *supra* note 32, at 1291.

37. *Id.* at 1294.

38. *See generally* Hoffman, *By the Course of the Law*, *supra* note 32; Hoffman, *Questions Before Answers*, *supra* note 29.

rights and remedies.<sup>39</sup> Rather, the clauses are meant “to assure that the remedies legally available were not to be denied because of the status of the parties.”<sup>40</sup>

Delaware was the first state, a colony at the time, to incorporate an open courts clause in its founding documents.<sup>41</sup> At that time, colonists were concerned about the closure of courts to civil actions, which had happened due to the Stamp Act<sup>42</sup> (and later, the Townshend Act<sup>43</sup>) during the years leading up to the Revolutionary War.<sup>44</sup> From this historical context, Hoffman further asserts, “An open courts clause analysis consistent with the origins of the provision should focus not on whether the legislature has abolished a ‘remedy’ but on whether the challenged action compromises the judiciary as an independent branch of government.”<sup>45</sup>

### *B. Indiana’s Interpretation of Its Open Courts Clause*

Indiana’s open courts clause states that “[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.”<sup>46</sup> In

39. Hoffman, *By the Course of the Law*, *supra* note 32, at 1288. Hoffman’s legal analysis centers around the use of open courts clauses as a check against legislative limits on tort remedies. He argues that it was not the intent of early state constitutional drafters to have open courts clauses “limit the power of the legislature in prescribing remedies.” *Id.* at 1308. He argues further that the use of these clauses to protest legislative caps on tort remedies and awards is inappropriate. *Id.* at 1317-18.

40. *Id.* at 1314.

41. *Id.* at 1284-85.

42. The Stamp Act of 1765 interfered with judicial independence by forbidding judges to accept payment from local colonial assemblies, ensuring that they were paid (and controlled by) the British Crown. *See id.* at 1302-03. Judicial decisions on papers that had not been stamped (and taxed) were invalid, which effectively foreclosed civil litigation in the colonies. *Id.* at 1303.

43. The Townshend Act of 1767 replaced the Stamp Act and also subverted the independence of the colonial judiciary. *See id.* at 1305-06.

44. *Id.* at 1307. Hoffman’s research found that Thomas McKean, a Delaware judge and drafter of the Delaware Declaration of Rights, “most likely was responsible for inserting the open courts clause into the first bill of rights of any state when he drafted the Delaware Declaration of Rights in 1776” and did so in response to the Stamp Act, which closed colonial courts to civil litigation. *Id.* at 1298. *But cf.* Schuman, *supra* note 28, at 1200-01 (focusing on the “right to a remedy” language in open courts clauses and asserting that historically, when these clauses were adopted, “the evil was renegade legislatures”).

45. Hoffman, *By the Course of the Law*, *supra* note 32, at 1316. Schuman, although focusing on the “remedy” aspect that Hoffman downplays, agrees that “the object of the constitutional provision is merely to *see to it that the judicial system operates fairly*.” Schuman, *supra* note 28, at 1201 (emphasis added).

46. IND. CONST. art. I, § 12.



*Smith v. Indiana Department of Correction*,<sup>47</sup> the Indiana Supreme Court provided an overview of Indiana's historical and judicial interpretation of the clause.

The *Smith* court noted that the open courts clause was reworded and moved from article I, section eleven of the 1816 Indiana Constitution to article I, section twelve of the 1851 Constitution,<sup>48</sup> but that there seemed to be "no unique Indiana history surrounding the adoption . . . in 1816 or its redrafting in 1851."<sup>49</sup> While recognizing that little evidence exists as to the history or purpose behind the clause,<sup>50</sup> the Indiana Supreme Court essentially adopted Hoffman's view of the clause's historical background,<sup>51</sup> attributing it to Sir Edward Coke's interpretation of Chapter 40 of the Magna Carta.<sup>52</sup>

Based on a reading of *Smith*, the Indiana Supreme Court interprets the open courts clause both to prohibit "outright closure of access to the courts"<sup>53</sup> and to require "unpurchased and impartial justice."<sup>54</sup> Although there is limited history behind the adoption of the clause, the "ordinary usage . . . is readily understood to mean, at a minimum, that to the extent the law provides a remedy for a wrong, the courts are available and accessible to grant relief."<sup>55</sup> The Indiana legislature can impose jurisdictional regulations and restrictions, but the open courts clause prevents the legislature from wholly taking away jurisdiction.<sup>56</sup> Therefore, "[a]ny regulation which would virtually deny . . . citizens the right to resort to this court would necessarily be unreasonable."<sup>57</sup> The *Smith* court maintained that the clause "guarantees to any person the right of access to the court subject to reasonable conditions and a determination of whether the law affords a remedy."<sup>58</sup>

## II. STATUS AND DEVELOPMENT OF INDIANA'S TREATMENT OF FRIVOLOUS INMATE SUITS

### A. *The Frivolous Claims Law and Credit Time Deprivation*

Indiana's Frivolous Claims Law requires courts to review all inmate complaints or petitions.<sup>59</sup> If the court determines that the claim is frivolous, does

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47. 883 N.E.2d 802 (Ind. 2008).

48. *Id.* at 807.

49. *Id.* (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 974 (Ind. 2000)).

50. *Id.* at 806.

51. *Id.* (citing Hoffman, *By the Course of the Law*, *supra* note 32, at 1281).

52. *Id.*

53. *Id.* at 807.

54. *Id.* (quoting *State v. Laramore*, 94 N.E. 761, 763 (Ind. 1911)).

55. *Id.*

56. *Id.* at 808.

57. *Id.* (quoting *Square D. Co. v. O'Neal*, 72 N.E.2d 654, 657 (Ind. 1947)).

58. *Id.* at 810.

59. IND. CODE § 34-58-1-2 (2011).

not state a claim for which relief may be granted, or seeks monetary relief from an immune defendant, the claim may not proceed.<sup>60</sup> The statute defines a frivolous claim as one that “(1) is made primarily to harass a person; or (2) lacks an arguable basis either in: (A) law; or (B) fact.”<sup>61</sup> Courts have used this statute not only to prevent inmates from filing claims,<sup>62</sup> but also to permit claims to proceed that appear meritorious.<sup>63</sup>

The Indiana Court of Appeals has compared the Frivolous Claims Law to a pre-filing Rule 12(B)(6) dismissal or grant of summary judgment.<sup>64</sup> In *Smith v. Huckins*,<sup>65</sup> the court noted that the failure to state “a claim upon which relief may be granted”<sup>66</sup> language in Indiana Code section 34-58-1-2 “mirrors the language of Trial Rule 12(B)(6) . . . that failure to state a claim upon which relief may be granted is cause for dismissal.”<sup>67</sup> The court also noted the distinction that unlike a Rule 12(B)(6) dismissal, a dismissal under section 34-58-1-2 is with prejudice because it prevents an offender from amending his complaint.<sup>68</sup> The court also noted that section 34-58-1-2 is similar to a motion for summary judgment except that “at the time of the trial court’s review of the complaint or petition, the defendant is not involved in the case.”<sup>69</sup> Altogether, the Frivolous Claims Law empowers courts to screen offender complaints discretionarily so that defendants named in frivolous suits need not invest any resources in answering the allegations.<sup>70</sup>

In addition to a court dismissing his claim with prejudice, an inmate could be deprived of credit time<sup>71</sup> if a state or administrative court determines, after a

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60. *Id.* § 34-58-1-2(a).

61. *Id.* § 34-58-1-2(b).

62. *See, e.g.,* Abdul-Wadood v. Batchelor, 865 N.E.2d 621, 623 (Ind. Ct. App. 2007); Peterson v. Meyer, No. 77A01-0607-CV-298, 2007 WL 1240291, at \*1 (Ind. Ct. App. Apr. 30, 2007). The Office of the Indiana Attorney General maintains a website listing of inmate suits that have been deemed frivolous. *Offender Litigation Screening*, OFFICE OF THE IND. ATT’Y GEN., <http://12.186.81.50/legal/litigation/litscreen/> (last visited June 25, 2011).

63. *See, e.g.,* Pallett v. Ind. Parole Bd., No. 77A01-0705-PC-200, 2007 WL 4463569, at \*2 (Ind. Ct. App. Dec. 21, 2007) (reversing a trial court’s dismissal under Indiana Code section 34-58-1-2 because the inmate’s “allegations create an arguable basis in law and fact . . . and there is no suggestion his petition is made to harass a person”); Ellison v. Graddick, No. 45A03-0601-CV-26, 2006 WL 3823182, at \*4 (Ind. Ct. App. Dec. 29, 2006) (noting that “the court completed the screening procedure of Indiana Code chapter 34-58-1 . . . . The court thereafter entered an order in which it determined that certain paragraphs of Ellison’s proposed complaint ‘could be a basis for an action for breach of contract and/or malpractice.’” (internal citation omitted)).

64. *Smith v. Huckins*, 850 N.E.2d 480, 483 (Ind. Ct. App. 2006).

65. *Id.*

66. IND. CODE § 34-58-1-2(a)(2).

67. *Smith*, 850 N.E.2d at 483.

68. *Id.*

69. *Id.*

70. *See id.*

71. Credit time, also referred to as gain time, is a reduction in the length of time of an



hearing, that he brought a civil claim that is “frivolous, unreasonable, or groundless.”<sup>72</sup> In *Parks v. Madison County*,<sup>73</sup> the Indiana Court of Appeals upheld the validity of the law enabling revocation of earned credit time under multiple constitutional claims.<sup>74</sup> The court rejected inmate Parks’s arguments that Indiana Code section 35-50-6-5(a)(4) was void for vagueness, overbroad, violated his right to substantive due process and equal protection, and violated his First Amendment right to petition the courts.<sup>75</sup> The court noted that the statute “was clearly intended to discourage prisoners from filing repetitive and meritless actions that burden judicial resources”<sup>76</sup> and that Parks showed a pattern of “dressing old arguments in new clothes, and then pressing them forward again.”<sup>77</sup> The court reasoned that “good-time credit” is not a fundamental right and determined that the statute withstood rational basis review.<sup>78</sup>

From 2004 to 2008, the Indiana Department of Correction Disciplinary Hearing Board found that forty-six inmates had filed frivolous claims, resulting in revocation of earned credit time.<sup>79</sup> In 2009, to address the issue of prison overcrowding and budgetary concerns,<sup>80</sup> the Commissioner for the Department of Correction set forth new sanctioning guidelines, including the guideline that credit time would no longer be revoked from inmates found to have filed a frivolous claim.<sup>81</sup> However, due to judiciary pressure, the Department of Correction plans to reinstate credit time deprivation as punishment for filing frivolous claims.<sup>82</sup> This reinstatement was set to take place on or after July 1, 2010.<sup>83</sup>

### B. The Three Strikes Law

The first version of Indiana’s Three Strikes Law<sup>84</sup> was passed in conjunction

inmate’s sentence. See IND. CODE §§ 35-50-6-3 to -8. Indiana inmates, depending on their crime, sentence, and other statutorily imposed limits, are able to earn credit time for obtaining an educational degree or participating in other programs such as substance abuse or life skills, so long as they also demonstrate “a pattern consistent with rehabilitation.” *Id.* § 35-50-6-3.3(a)(2).

72. IND. CODE § 35-50-6-5(a)(4).

73. 783 N.E.2d 711 (Ind. Ct. App. 2002).

74. *Id.* at 715-16.

75. *Id.* at 722.

76. *Id.* at 723.

77. *Id.* at 722.

78. *Id.* at 724.

79. E-mail from Sarah Schelle, Ind. Dep’t of Corr. Program Dir./Research Analyst, to author (Feb. 24, 2010, 14:27 EST) (on file with author).

80. See E-mail from Sarah Schelle, Ind. Dep’t of Corr. Program Dir./Research Analyst, to author (Feb. 25, 2010 13:07 EST) (on file with author).

81. STATE OF IND., DEP’T OF CORR., EXECUTIVE DIRECTIVE No. 09-07 (Jan. 21, 2009).

82. See E-mail from Sarah Schelle, *supra* note 80.

83. See *id.*

84. IND. CODE § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified at IND. CODE § 34-10-1-

with the Frivolous Claims Law.<sup>85</sup> It barred a court from proceeding with an inmate’s complaint or petition “[i]f an offender has filed at least three (3) civil actions in which a state court has dismissed the action or a claim under IC 34-58-1-2 . . . unless a court determines that the offender is in immediate danger of serious bodily injury.”<sup>86</sup> In *Smith v. Indiana Department of Correction*,<sup>87</sup> the Indiana Supreme Court determined that as written, the Three Strikes Law violated the open courts clause of the Indiana Constitution.<sup>88</sup>

In *Smith*, the trial court dismissed inmate Eric Smith’s complaint regarding correctional staff use of chemical spray and pepper balls under the Three Strikes Law because he previously had three suits dismissed under the Frivolous Claims Law.<sup>89</sup> Smith filed suit challenging the constitutionality of the Three Strikes Law under the open courts clause of the Indiana Constitution.<sup>90</sup> In 2006, the Indiana Court of Appeals, in a matter of first impression,<sup>91</sup> drew an analogy between the Three Strikes Law and a legislatively enacted statute of limitations.<sup>92</sup> Just as a litigant is limited by a prescribed statute of limitations, “[a]n offender can bring as many civil actions as he wants, as long as three actions or claims have not been dismissed as being frivolous.”<sup>93</sup> If three prior actions were deemed frivolous, the inmate could “continue to bring civil actions as long as a court determines that he is in immediate danger of serious bodily injury.”<sup>94</sup>

The Indiana Supreme Court reversed the court of appeals and concluded that the Three Strikes Law violated the open courts clause.<sup>95</sup> The court held that while the clause “does not prohibit all conditions on access to the courts . . . it does prevent the legislature from arbitrarily or unreasonably denying access to the courts to assert a statutory or common law cause of action that is in itself unmodified and unrestricted.”<sup>96</sup> Within its analysis, the opinion expressly cited six states for their statutes addressing the issue of “frequent and frivolous”<sup>97</sup> filers. The court reasoned that Indiana’s Three Strikes Law was

[u]nique in imposing a complete ban on filing based on the plaintiff’s prior litigation. The . . . [l]aw sweeps with a broader brush than the law

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3 (2011)).

85. *Id.* § 34-58-1-2.

86. *Id.* § 34-58-2-1, *repealed by* P.L. 128-2009, § 4 (codified at IND. CODE § 34-10-1-3).

87. 883 N.E.2d 802 (Ind. 2008).

88. *Id.* at 803.

89. *Id.* at 803-04.

90. *Id.* at 804.

91. *Smith v. Ind. Dep’t of Corr.*, 853 N.E.2d 127, 133 (Ind. Ct. App. 2006), *rev’d*, 883 N.E.2d 802 (Ind. 2008).

92. *Id.* at 134.

93. *Id.*

94. *Id.*

95. *Smith*, 883 N.E.2d at 805-06.

96. *Id.* at 808.

97. *Id.*



of any other United States jurisdiction because it operates as an indiscriminate statutory ban, not merely a condition to access the courts. *The law bars claims purely on the basis of the plaintiff's prior activity without regard to the merits of the claim presented.* . . . [S]uch a ban on presenting any claims at all denies a "remedy by due course of law" for obvious wrongs that are otherwise redressable in court.<sup>98</sup>

The court also reasoned that the law does not really help alleviate the work of the courts because courts still have to confirm that the inmate has previously had three suits dismissed and has not alleged bodily injury.<sup>99</sup> The opinion concluded by referring to the previously-cited states' treatment of the issue, with the suggestion that "other courts have upheld other less stringent methods [of reasonable conditions to access], such as requiring filing fees, to deter frivolous filing."<sup>100</sup>

Following the *Smith* opinion in April 2008, the Indiana legislature passed an amended version of the Three Strikes Law<sup>101</sup> during the 2009 summer legislative session. The amended law maintains the same language as the previous version, except that the provision now restricts indigent inmates from filing suit, absent a determination of immediate danger, if three suits have been previously dismissed as frivolous.<sup>102</sup> When an offender files a civil suit as an indigent, he must file a statement reflecting the balance of his trust account<sup>103</sup> for the six months prior to filing.<sup>104</sup> The court may approve a total fee waiver due to exceptional circumstances.<sup>105</sup> Otherwise, the offender must pay a partial filing fee of 20% of the greater of "(1) the average monthly deposits to the offender's account; or (2) the average monthly balance in the offender's account; for the six (6) months immediately preceding the filing of the complaint or petition."<sup>106</sup>

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98. *Id.* at 809-10 (emphasis added) (internal citation omitted).

99. *Id.* at 810. The court stated, "Processing a frivolous claim, which the Constitution demands, will impose little more burden on the courts beyond those that would be required if the Three Strikes Law were upheld. If the claim is truly frivolous, the court can dismiss it under the Frivolous Claim[s] Law." *Id.*

100. *Id.*

101. IND. CODE § 34-10-1-3 (2011).

102. *Id.* Regarding indigence, Indiana law provides that courts may grant indigent status to a plaintiff or defendant upon application by the party to the court in which the action is pending. IND. CODE § 34-10-1-1.

103. An inmate's trust account is an account held by the state while the inmate is incarcerated. See IND. CODE § 4-24-6-2(a) (providing that "the superintendent or warden of an institution shall hold in trust funds deposited with the institution for the use and benefit of, or belonging to, any inmate"). A prison administrator supervises and regulates deposits and withdrawals; all funds are paid to the inmate upon his release. *Id.* § 4-24-6-3.

104. IND. CODE § 33-37-3-3(a).

105. *Id.* § 33-37-3-3(c)-(d).

106. *Id.* § 33-37-3-3(b).

### III. EXAMINATION OF JURISDICTIONS CITED IN *SMITH* FOR TREATMENT OF SUIT FRIVOLITY

The majority in *Smith* cited six states, as well as federal laws, that address or place various requirements on frivolous filers.<sup>107</sup> Notably, only four of the jurisdictions cited as examples have open courts clauses with which these provisions must comport.<sup>108</sup> Additionally, none of the states highlighted by the Indiana Supreme Court outright bar an inmate from filing suit based on indigent status or number of previous suits filed. This section will review the statutes expressly cited by the Indiana Supreme Court in *Smith*, as well as other relevant statutes within each jurisdiction’s framework and any challenges made under applicable open courts clauses.

#### A. Delaware

Delaware law provides that all complaints submitted in forma pauperis<sup>109</sup> are subject to review and dismissal if “the court finds the action is factually frivolous, malicious or, upon a court’s finding that the action is legally frivolous and that even a *pro se* litigant, acting with due diligence, should have found well settled law disposing of the issue(s) raised.”<sup>110</sup> The statute also states that a court can require a litigant to get judicial permission before filing future claims if it determines that the litigant has abused the court system with frivolous or malicious filings.<sup>111</sup> If so enjoined,

any future requests to file claims must be accompanied by an affidavit certifying that: (1) [t]he claims sought to be litigated have never been raised or disposed of before in any other court; (2) [t]he facts alleged are true and correct; (3) [t]he affiant has made a diligent and good faith effort to determine what relevant case law controls the legal issues raised; (4) [t]he affiant has no reason to believe the claims are foreclosed by controlled law; and (5) [t]he affiant understands that the affidavit is made under penalty of perjury.<sup>112</sup>

Although title 10, section 8803 applies to all in forma pauperis litigants, not just inmates,<sup>113</sup> Delaware courts have routinely used the statute to dismiss inmate

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107. *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 808-09 (Ind. 2008). The court cited California, Colorado, Delaware, Florida, Hawaii, and Texas statutory codes. *Id.* The court also cited federal treatment of the subject. *Id.* at 809.

108. See *supra* note 25 and accompanying text.

109. “In forma pauperis” means “in the manner of an indigent who is permitted to disregard filing fees and court costs.” BLACK’S LAW DICTIONARY 794 (8th ed. 2004).

110. DEL. CODE ANN. tit. 10, § 8803(b) (West, Westlaw through 2010 Leg).

111. *Id.* § 8803(e).

112. *Id.*

113. See, e.g., *Beeghley v. Beeghley*, No. 215,200, 2000 WL 1152420, at \*1 (Del. Aug. 8, 2000) (upholding a family court order that required a husband and wife to “file a contemporaneously-sworn affidavit affirming, among other things, that the latest petition raises



filings as legally or factually frivolous.<sup>114</sup> Courts have required inmates who abuse the court system with excessive and repetitious filings to gain permission of the court prior to future filings, either in relation to a specific cause of action such as post-conviction relief<sup>115</sup> or for any future filing.<sup>116</sup> However, the Delaware Supreme Court has also reversed a case due to wrongful dismissal of an *in forma pauperis* inmate suit.<sup>117</sup> In *Deputy v. Dr. Conlan*, an *in forma pauperis* inmate alleged medical negligence against a warden, doctor, and health administrator of a state correctional center.<sup>118</sup> The court found “that Deputy’s complaint, both factually and legally, stated a claim of a violation of his constitutional rights sufficient to withstand summary dismissal under [Delaware Code title 10, section 8803(b)].”<sup>119</sup>

Delaware’s constitution contains an open courts clause,<sup>120</sup> but there have been no constitutional challenges to title 10, section 8803 via the open courts clause or otherwise.<sup>121</sup>

Delaware’s review of *in forma pauperis* complaints is similar to Indiana’s pre-filing review of inmate complaints under the Frivolous Claims Law.<sup>122</sup>

claims that were not previously raised or disposed of by any court”); *Hall v. Yacucci*, No. 98C-05-249 SCD, 1998 WL 473008, at \*1 (Del. Super. Ct. June 4, 1998) (dismissing an *in forma pauperis* complaint that alleged employment discrimination as legally and factually frivolous), *aff’d*, 723 A.2d 839 (Del. 1998).

114. *See, e.g.*, *Smith v. State*, No. 259,2009, 2009 WL 2888258, at \*1 (Del. Sept. 10, 2009), *cert. denied*, 130 S. Ct. 1508 (2010); *Miller v. State*, No. 72,2009, 2009 WL 1204622, at \*1 (Del. May 5, 2009); *Biggins v. Rodweller*, No. 296,2008, 2008 WL 4455553, at \*1 (Del. Oct. 3, 2008); *Epperson v. State*, No. 123,2006, 2006 WL 1547975, at \*1 (Del. June 5, 2006).

115. *See, e.g.*, *Smith*, 2009 WL 2888258, at \*1-2 (enjoining an inmate who had filed twelve unsuccessful post-conviction attacks from filing any further appeals without first seeking leave of the court); *Miller*, 2009 WL 1204622, at \*1 (enjoining an inmate from future filings in connection with his guilty plea without court approval).

116. *See, e.g.*, *Epperson*, 2006 WL 1547975, at \*1 (enjoining inmate Epperson from filing any claims without first seeking the court’s approval).

117. *Deputy v. Dr. Conlan*, No. 168,2007, 2007 WL 3071424, at \*1 (Del. Oct. 22, 2007).

118. *Id.*

119. *Id.*

120. DEL. CONST. art. I, § 9 provides that

[a]ll courts shall be open; and every person for an injury done him or her in his or her reputation, person, movable or immovable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense. Suits may be brought against the State, according to such regulations as shall be made by law.

121. The “Notes of Decisions” and “Additional Citing Cases” cited by Westlaw for DEL. CODE ANN. tit. 10, § 8803 were reviewed to determine that there have been no challenges as to the validity of the law. Additionally, the “Notes of Decisions” cited by Westlaw for DEL. CONST. art. I, § 9 were reviewed, and a “locate in result” search of “frivolous” and “malicious” was conducted, yielding no results.

122. IND. CODE § 34-58-1-2 (2011).

However, Delaware’s pre-filing review approach is broader than Indiana’s. It applies to any in forma pauperis suit<sup>123</sup> and gives greater discretion to courts in limiting frivolous filers’ ability to proceed with future action without a showing of honesty and good faith.<sup>124</sup> Additionally, Delaware’s framework does not foreclose a court’s ability to process a valid claim based on the number of previous suits by the litigant deemed frivolous.<sup>125</sup>

### *B. Texas*

Texas has also enacted legislation that is not restricted to inmate filings. Like Delaware, a portion of Texas’s statutory framework addresses in forma pauperis filings.<sup>126</sup> However, Texas law also provides for additional review of filings by inmates<sup>127</sup> and others deemed “vexatious.”<sup>128</sup>

Under Texas’s vexatious litigant laws, courts can require litigants deemed as such to furnish a security<sup>129</sup> and subject them to future pre-filing conditions and review.<sup>130</sup> Courts may deem a litigant vexatious if a defendant shows that the plaintiff has no reasonable probability of prevailing.<sup>131</sup> To be deemed vexatious, the litigant must have “commenced, prosecuted, or maintained in propria persona at least five litigations” in the last seven years that have been deemed frivolous, determined adversely, or remained pending in a pre-trial stage for at least two years.<sup>132</sup> For purposes of furnishing a security, a court cannot act sua sponte to determine that a litigant is vexatious. A court can make the determination only upon a defendant’s motion submitted within ninety days of the answer.<sup>133</sup> However, a court may act on its own to determine that a litigant is generally vexatious.<sup>134</sup> Once a court makes either determination, future actions of a vexatious litigant require review by an administrative law judge and are permissible only if that judge determines the litigation has merit and was not filed “for the purposes of harassment or delay.”<sup>135</sup> Texas law also enables courts to dismiss any in forma pauperis or inmate action determined to be frivolous or malicious.<sup>136</sup>

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123. DEL. CODE ANN. tit. 10, § 8803(a) (West, Westlaw through 2010 Leg.).

124. *Id.* § 8803(e).

125. *Compare* DEL. CODE ANN. tit. 10, § 8803, *with* IND. CODE § 34-10-1-3.

126. TEX. CIV. PRAC. & REM. CODE ANN. § 13.001 (West, Westlaw through 2009 Reg. Sess.).

127. *Id.* § 14.003.

128. *Id.* §§ 11.051 to -.057.

129. *Id.* § 11.055.

130. *Id.* §§ 11.052 to -.054.

131. *Id.* § 11.054.

132. *Id.* § 11.054(1).

133. *Scott v. Tex. Dep’t of Criminal Justice-Inst. Div.*, No. 13-07-00718-CV, 2008 WL 4938265, at \*1 (Tex. App. Nov. 20, 2008).

134. TEX. CIV. PRAC. & REM. CODE ANN. § 11.101(a).

135. *Id.* § 11.102(a).

136. *Id.* § 13.001(a).



The Texas Constitution contains an open courts clause.<sup>137</sup> A Texas court has upheld the validity of Texas Civil Practice and Remedies Code section 13.001, which allows courts to dismiss in forma pauperis actions deemed frivolous or malicious under that clause.<sup>138</sup> In *Timmons v. Luce*, the court determined that

[t]here is no right to redress for claims that have no basis in law or fact. We hold that section 13.001, at least insofar as it authorizes dismissal of an action brought without payment of costs when there is no arguable basis for the action in law or fact, does not violate article I, section 13 of the Texas Constitution.<sup>139</sup>

Additionally, prior legal analysis of Texas's treatment of vexatious litigants suggests that the state's framework would withstand scrutiny under the state's open courts clause.<sup>140</sup> Although it is possible that a court may wrongfully bar a plaintiff from filing his claim,<sup>141</sup> the laws provide procedural safeguards such as enabling a court to stay the proceedings to assess the merits and purpose of the plaintiff's claim.<sup>142</sup> Additionally, an appellate court will review a plaintiff's appeal for abuse of discretion if the trial court deemed the plaintiff vexatious.<sup>143</sup>

### C. Florida

Florida's statutory scheme contains specific provisions for suits filed by indigent prisoners,<sup>144</sup> frivolous suits filed by any inmate,<sup>145</sup> and suits filed by any litigant deemed "vexatious."<sup>146</sup> Section 57.085 of Florida's code, known as the Prison Indigency Statute,<sup>147</sup> requires indigent prisoners to pay back court costs and fees as funds become available to them.<sup>148</sup> When a court determines that a

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137. TEX. CONST. art I, § 13 says, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

138. *Timmons v. Luce*, 840 S.W.2d 582, 583 (Tex. App. 1992).

139. *Id.* at 585.

140. Chris Colby, Comment, *There's a New Sheriff in Town: The Texas Vexatious Litigants Statute and Its Application to Frivolous and Harassing Litigation*, 31 TEX. TECH L. REV. 1291, 1343-47 (2000).

141. *Id.* at 1345.

142. *Id.* at 1346 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 11.052 (West, Westlaw through 2009 Reg. Sess.)).

143. *Id.* (citation omitted).

144. FLA. STAT. ANN. § 57.085 (West, Westlaw through 2010 2d Reg. Sess.). The Indiana Supreme Court's *Smith v. Indiana Department of Correction* opinion did not reference this portion of Florida's civil code.

145. *Id.* § 944.279(1). The Indiana Supreme Court's *Smith v. Indiana Department of Correction* opinion highlighted this portion of Florida's civil code.

146. *Id.* § 68.093(3)(a). The Indiana Supreme Court's *Smith v. Indiana Department of Correction* opinion highlighted this portion of Florida's civil code.

147. *Mitchell v. Moore*, 786 So. 2d 521, 523 (Fla. 2001).

148. FLA. STAT. ANN. § 57.085.

prisoner is indigent for purposes of filing a civil suit, the court must “order the prisoner to make monthly payments of no less than 20 percent of the balance of the prisoner’s trust account as payment of court costs and fees.”<sup>149</sup> The Department of Corrections is to “place a lien on the inmate’s trust account for the full amount of the court costs and fees, and . . . withdraw money maintained in that trust account and forward the money, when the balance exceeds \$10 . . . until the prisoner’s court costs and fees are paid in full.”<sup>150</sup>

In *Kalway v. State*,<sup>151</sup> the Florida District Court of Appeal upheld the statute requiring courts to use prisoners’ trust accounts for payment of court costs and fees.<sup>152</sup> The inmate argued a constitutional separation of powers violation, but the court maintained that “[a] decision whether to subject a prisoner’s trust account to payment of court costs and fees is clearly a subjective determination appropriately made by the legislature.”<sup>153</sup> In *Jackson v. Florida Department of Corrections*,<sup>154</sup> the Florida Supreme Court agreed that the legislature could properly require “that inmates contribute toward the costs of their lawsuits and ultimately pay for the lawsuits in full if they subsequently become able to do so.”<sup>155</sup>

Specifically addressing frivolous inmate filings, Florida’s statutory code provides that on its own or upon motion,

a court may conduct an inquiry into whether any [civil] action or appeal brought by a prisoner was brought in good faith. A prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal . . . or who knowingly or with reckless disregard for the truth brought false information or evidence before the court, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections.<sup>156</sup>

If a court finds that a prisoner brought a frivolous or malicious suit, the Department of Corrections can discipline the inmate by retracting all or part of the gain-time<sup>157</sup> the inmate has acquired<sup>158</sup> after a hearing before the prison’s

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149. *Id.* § 57.085(5).

150. *Id.*

151. 730 So. 2d 861 (Fla. Dist. Ct. App. 1999).

152. *Id.* at 862.

153. *Id.*

154. 790 So. 2d 381 (Fla. 2000).

155. *Id.* at 384.

156. FLA. STAT. ANN. § 944.279(1) (West, Westlaw through 2010 2d Reg. Sess.).

157. Gain-time is a reduction in an inmate’s sentence that the Department of Corrections may issue “to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services.” *Id.* § 944.275(1). For offenses committed after October 1, 1995, the department may grant an inmate up to ten days per month in gain-time, so long as the gain-time accrued does not reduce the inmate’s sentence to less than 85% of the original amount of time. *Id.* § 944.275(4)(b)(3).

158. *Id.* § 944.28(2)(a).



disciplinary committee and upon approval of the prison's warden.<sup>159</sup> The Department can also deny the ability to accumulate gain-time throughout the duration of the inmate's sentence based on a single instance of misconduct or an accumulation of various forms of misconduct,<sup>160</sup> including the instigation of a frivolous suit.<sup>161</sup>

The Florida Vexatious Litigant Law<sup>162</sup> addresses the issue of frequent and potentially frivolous filings made by any pro se plaintiff, not limited strictly to inmates.<sup>163</sup> Under this statute, defendants in civil actions can move the court to require a plaintiff to furnish security based on a showing "that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action."<sup>164</sup> Florida defines a vexatious litigant as a pro se filer who "has commenced, prosecuted, or maintained" five or more civil actions in the past five years that "have been finally and adversely determined against"<sup>165</sup> him.

Florida courts have upheld the vexatious and inmate filing statutes under challenges via the state's open courts clause.<sup>166</sup> In *Smith v. Fisher*,<sup>167</sup> an inmate filed a suit against a doctor, and upon motion, the court required the inmate to furnish a six hundred dollar security because the inmate had more than five cases determined adversely against him in the past five years.<sup>168</sup> The judge dismissed the suit upon the inmate's failure to furnish the security.<sup>169</sup> The Florida District Court of Appeal upheld the statute against the inmate's open courts clause objections, stating, "[s]ignificantly, the determination that a plaintiff is a vexatious litigant does not shut the courthouse door."<sup>170</sup> Additionally, the court noted that the Vexatious Litigant Law does not affect cases that are "likely meritorious" because before a courts requires a security, a vexatious litigant within the statutory definition has the opportunity to demonstrate the merits of his suit and "that he is 'reasonably likely to prevail on the merits.'"<sup>171</sup>

159. *Id.* § 944.28(2)(c).

160. *Id.* § 944.28(2)(b).

161. *Id.* § 944.28(2)(a).

162. *Id.* § 68.093.

163. *Id.* § 68.093(2)(d).

164. *Id.* § 68.093(3)(a). California, Texas, and Hawaii (in addition to Ohio) all had similar statutory provisions when Florida enacted its statute in 2000. Deborah L. Neveils, Note, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers?*, 25 NOVA L. REV. 343, 359 (2000). Neveils notes that Florida modeled its statute after the California Vexatious Litigant Statute. *Id.*

165. FLA. STAT. ANN. § 68.093(2)(d)(1).

166. FLA. CONST. art. I, § 21 provides that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

167. 965 So. 2d 205 (Fla. Dist. Ct. App. 2007).

168. *Id.* at 207.

169. *Id.*

170. *Id.* at 209.

171. *Id.* (quoting FLA. STAT. ANN. § 68.093(3)(b) (West, Westlaw through 2010 2d Reg. Sess.)).

In *Spencer v. Florida Department of Corrections*,<sup>172</sup> the Florida Supreme Court upheld the forfeiture of an inmate’s gain-time as a sanction for bringing a frivolous suit, finding the statute constitutional under the Florida open courts clause.<sup>173</sup> The court reasoned that the statute did not prevent inmate Spencer from accessing the courts and filing his lawsuit. Rather than restricting access, the statute merely permitted discipline if the inmate committed misconduct with a frivolous filing.<sup>174</sup> The court concluded:

While making inmates who have funds contribute toward the costs of their lawsuits is one way of encouraging inmates to be responsible for their lawsuits, if the inmate has no funds, that means of reducing frivolous lawsuits is only partially effective. Making inmates responsible by sanctioning them for their actions when they abuse the judicial system is a reasonable and practical way to discourage frivolous lawsuits when the payment provisions do not remedy the problem.<sup>175</sup>

The Florida Supreme Court utilized the open courts clause of the Florida Constitution to strike a portion of section 57.085, the Prison Indigency Statute, in *Mitchell v. Moore*.<sup>176</sup> Section 57.085(7) of the Florida Code required an inmate whom the court had adjudicated as indigent twice in the past three years to request permission of the court before filing again as an indigent.<sup>177</sup> With this request, the inmate was required to “provide a complete listing of each suit, action, claim, proceeding, or appeal brought . . . or intervened in by the prisoner in any court or other adjudicatory forum in the preceding . . . [five] years” and attach copies of each, along with a record of the proceedings.<sup>178</sup>

The court determined that the copy requirement was unconstitutional within the meaning of the open courts clause.<sup>179</sup> Requiring indigent inmates to attach copies of all documents and records relating to all suits filed within the past five

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172. 823 So. 2d 752 (Fla. 2002).

173. *Id.* at 755. The court also rejected Spencer’s constitutionality arguments regarding federal and state freedom of speech protections. *But see* Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners’ Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1078 (2002) (proposing that revocation of prisoners’ good-time credits for filing frivolous lawsuits is unconstitutional for a number of reasons, including that it places a “chilling effect on the right of prisoners embedded in the First Amendment to petition courts for a redress of grievances”).

174. *Spencer*, 823 So. 2d at 756.

175. *Id.*

176. 786 So. 2d 521, 523 (Fla. 2001).

177. FLA. STAT. ANN. § 57.085(7) (West, Westlaw through 2010 2d Reg. Sess.).

178. *Id.*

179. *Mitchell*, 786 So. 2d at 527. Although the court first struck down the copy requirement in *Jackson v. Florida Department of Corrections*, 790 So. 2d 381 (Fla. 2000), the court found it “necessary to further address the copy requirement due to the importance of the constitutional issue raised.” *Mitchell*, 786 So.2d at 523.



years constituted “a door to the [c]ourt that some inmates simply cannot open.”<sup>180</sup> Using a strict scrutiny analysis, the court said the copy requirement was overbroad because it did not specifically target frivolous or malicious civil actions, which were the “targeted evil” identified by the legislature for implementing the copy requirement.<sup>181</sup> The court interpreted the language of the open courts clause to “indicate that a violation occurs if the statute obstructs or infringes that right [to access the court] to any significant degree.”<sup>182</sup> Florida’s comprehensive legislative approach to address frivolous filers—inmates and others—has withstood judicial scrutiny under the state’s open courts clause, except for the copy requirement.

#### D. Colorado

Colorado’s statutory framework contains a three strikes law pertaining to frivolous inmate suits.<sup>183</sup> The state forbids indigent inmates from filing claims regarding prison conditions if they have previously brought three civil actions “based upon prison conditions that . . . [have] been dismissed on the grounds that it was frivolous, groundless, or malicious or failed to state a claim upon which relief may be granted or sought monetary relief from a defendant who is immune from such relief.”<sup>184</sup> The provision contains an exception if imminent danger of serious physical injury is sufficiently alleged.<sup>185</sup> Colorado also requires an indigent inmate to pay his filing fee and service of process fees over time, in full, in monthly payments equaling 20% of the deposits made to his inmate account from the prior month.<sup>186</sup>

Colorado has an open courts clause,<sup>187</sup> but Colorado courts have not addressed the constitutionality of section 13-17.5-102.7.<sup>188</sup> Notably, the penultimate section of article 17.5 contains a severability clause, which states:

Nothing in this article shall be construed to impede an inmate’s constitutional right of access to the courts. If any provision of this section or the application thereof to any person or circumstances is held

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180. *Id.* at 525.

181. *Id.* at 528. The statute subjected all indigent inmates with more than two filings in three years to the copy requirement, not just indigent inmates whose previous suits were deemed frivolous or malicious or whose current action was potentially frivolous or malicious. *See id.*

182. *Id.* at 527.

183. COLO. REV. STAT. § 13-17.5-102.7 (2010).

184. *Id.* § 13-17.5-102.7(1).

185. *Id.* § 13-17.5-102.7(2).

186. *Id.* § 13-17.5-103. The Indiana Supreme Court did not cite this statute in *Smith v. Indiana Department of Correction*, 883 N.E.2d 802 (Ind. 2008).

187. COLO. CONST. art II, § 6 provides, “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.”

188. There are no “Notes of Decisions” or “Additional Citing Cases” provided by Westlaw for COLO. REV. STAT. § 13-17.5-107.

invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this section which can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this section are declared to be severable.<sup>189</sup>

This language suggests that the Colorado legislature anticipated that aspects of its statutory limitations might not comport with constitutional requirements. Still, Colorado’s restriction on prison condition actions made by indigent inmates with a history of frivolous filings<sup>190</sup> does not reach as far as Indiana’s ban of any civil suit (absent immediate danger of serious bodily harm) by an indigent inmate with three previous frivolous filings.<sup>191</sup>

### *E. California*

Under California’s Vexatious Litigant Law,<sup>192</sup> after which Florida modeled its statute,<sup>193</sup> a defendant may move a court for a hearing to determine that a plaintiff is a vexatious litigant.<sup>194</sup> California defines a vexatious litigant as a person who “has commenced, prosecuted, or maintained in propria persona at least five litigations” in the past seven years that have been determined adversely against the person or were pending at least two years “without having been brought to trial or hearing.”<sup>195</sup> Additionally, an in propria persona litigant may be deemed vexatious if he “repeatedly relitigates or attempts to relitigate” the validity of past determinations against the same defendant.<sup>196</sup> Finally, a court might also determine that he is vexatious if he “repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay”<sup>197</sup> or if another jurisdiction has declared him vexatious.<sup>198</sup>

After a hearing, a court may order the plaintiff to furnish security if it determines “that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation.”<sup>199</sup> The statute also enables a court, on its own, to require that a vexatious litigant obtain permission from the presiding judge prior to filing any future civil actions.<sup>200</sup>

California’s Vexatious Litigant Law has been criticized because of judges’

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189. COLO. REV. STAT. § 13-17.5-107.

190. *See id.* § 13-17.5-102.7.

191. *See* IND. CODE § 34-10-1-3 (2011).

192. CAL. CIV. PROC. CODE § 391 (2010).

193. Neveils, *supra* note 164, at 359.

194. CAL. CIV. PROC. CODE § 391.1.

195. *Id.* § 391(b)(1).

196. *Id.* § 391(b)(2).

197. *Id.* § 391(b)(3).

198. *Id.* § 391(b)(4).

199. *Id.* § 391.3.

200. *Id.* § 391.7.



“irregular application” of the law.<sup>201</sup> Scholar Lee Rawles has suggested that this irregularity comes from judicial unfamiliarity<sup>202</sup> or uncertainty.<sup>203</sup> Additionally, judges may believe that the statute is too severe or harsh.<sup>204</sup> This illustrates a tension felt by judges “between giving people access to the court system and limiting the use that people can make of that very system.”<sup>205</sup>

California’s constitution does not contain an open courts clause,<sup>206</sup> but the vexatious litigant statutory framework has withstood constitutional challenges of equal protection, due process, vagueness, and other challenges under the California and federal constitutions.<sup>207</sup> In *Wolfe v. George*, the Ninth Circuit held that the vexatious litigant statute did not violate equal protection because “[f]requent pro se litigants are not a suspect class.”<sup>208</sup> Additionally, because the statute gives fair notice, the court determined that the statute was not unconstitutionally vague.<sup>209</sup> The litigant’s First Amendment claim failed because “[j]ust as false statements are not immunized by the First Amendment right to freedom of speech[] . . . baseless litigation is not immunized by the First Amendment right to petition.”<sup>210</sup>

#### F. Hawaii

Hawaii has a statutory provision similar to those of Texas, Florida, and California as to vexatious litigants.<sup>211</sup> A defendant can move a court to order a plaintiff to furnish security upon showing “that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation.”<sup>212</sup> On its own or upon motion, a court may deem a litigant vexatious and prohibit him from filing any new litigation without prior approval of the presiding judge.<sup>213</sup> A judge “shall permit the filing of litigation only if it appears, after hearing, that the litigation has merit and has not been filed for the purposes of harassment or delay” and may still require the litigant to furnish a security.<sup>214</sup>

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201. Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 303 (1998).

202. *Id.* at 301.

203. *Id.* at 303.

204. *Id.* at 301.

205. *Id.* (quoting Kim Boatman, *State Throws the Book at “Vexatious Litigant,”* L.A. DAILY NEWS, Feb. 25, 1996, at N18).

206. See Schuman, *supra* note 28, at 1201 n.25.

207. See, e.g., *Wolfe v. George*, 486 F.3d 1120 (9th Cir. 2007); *Taliaferro v. Hoogs*, 46 Cal. Rptr. 147 (Cal. Ct. App. 1965).

208. 486 F.3d at 1126.

209. *Id.* at 1125.

210. *Id.* (internal citations omitted).

211. Neveils, *supra* note 164, at 359.

212. HAW. REV. STAT. ANN. § 634J-2 (West, Westlaw through 2010 legislation).

213. *Id.* § 634J-7(a).

214. *Id.* § 634J-7(b).

Hawaii’s constitution does not have an open courts clause.<sup>215</sup> However, in *Ek v. Boggs*,<sup>216</sup> the Hawaii Supreme Court upheld its vexatious litigant law on federal and state procedural due process grounds.<sup>217</sup> Here, the court upheld the statutory framework that enabled a court to deem a litigant vexatious and required him to post a \$25,000 bond in order to continue his current suit, in addition to requiring him to “*obtain [court] approval . . . prior to filing any future pleadings.*”<sup>218</sup> Although Hawaii, like California, does not have an open courts clause, Florida has upheld the validity of a similar framework under its open courts clause, which suggests that Hawaii’s statutory scheme is also legitimate.<sup>219</sup>

### G. Federal Law

The Prison Litigation Reform Act<sup>220</sup> places limits and guidelines on prisoner suits brought in federal courts.<sup>221</sup> Under this framework, a federal court may authorize an inmate suit “without prepayment of fees or security” upon receiving an affidavit stating that the inmate is unable to pay.<sup>222</sup> However, a prisoner is eventually required to pay the full filing fee, beginning with a partial payment of either 20% of his average account deposits or 20% of his average monthly balance.<sup>223</sup> He is then required to pay the remainder of the filing fee in monthly installments, based on 20% of the balance of his account for the month prior (so long as the balance is greater than ten dollars).<sup>224</sup> If a prisoner has no means to pay the initial partial filing fee, he is not prohibited from bringing the action.<sup>225</sup>

The United States Code contains a three strikes provision that precludes an inmate from bringing a civil suit in forma pauperis. The provision applies if the inmate has had three civil suits dismissed as “frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted” (unless in “imminent danger of serious physical injury”).<sup>226</sup>

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215. See Schuman, *supra* note 28, at 1201 n.25.

216. 75 P.3d 1180 (Haw. 2003).

217. *Id.* at 1189.

218. *Id.* at 1183.

219. See *supra* Part III.C.

220. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (codified as amended at 28 U.S.C. § 1915 and in various sections of 18 U.S.C., 28 U.S.C., & 42 U.S.C.).

221. See Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You’re Out of Court—It May Be Effective, but Is It Constitutional?*, 70 TEMP. L. REV. 471 (1997).

222. 28 U.S.C. § 1915(a)(1).

223. *Id.* § 1915(b)(1).

224. *Id.* § 1915(b)(2).

225. *Id.* § 1915(b)(4).

226. *Id.* § 1915(g). According to Michael B. Mushlin, “[o]f all the provisions of the PLRA, this one poses the most risk of permanently closing the courthouse door to meritorious claims.” 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 17:34 (4th ed. 2009).



The United States Constitution does not contain an open courts clause,<sup>227</sup> but the federal three strikes provision of the Prison Litigation Reform Act has withstood constitutional challenge on other grounds.<sup>228</sup> The right of meaningful access to the courts stems from the Due Process Clause of the U.S. Constitution, which requires that “prisoners must have access to the courts to protect their fundamental rights.”<sup>229</sup> In *Lewis v. Sullivan*,<sup>230</sup> the United States District Court for the Western District of Wisconsin found 28 U.S.C. § 1915(g) unconstitutional to the extent that it prevented a prisoner from “raising claims of the violation of a substantial constitutional right.”<sup>231</sup> However, the Seventh Circuit reversed that decision, finding that the disputed section did not violate equal protection or a right to access the courts under due process.<sup>232</sup> As Judge Easterbrook noted, “[E]veryone allowed to proceed *in forma pauperis* owes the fees and must pay when able; the line drawn by § 1915(g) concerns only the *timing* of payment.”<sup>233</sup> Essentially, the federal framework, unconstrained by a constitutional open courts clause, requires potential inmate litigants to pay the fees at the onset of filing as if they were not indigent.

When the Indiana legislature promulgated the amended version of the Three Strikes Law, it basically adopted the federal three strikes language precluding indigent inmates from proceeding with claims if prior suits were deemed frivolous.<sup>234</sup> The legislature overlooked the state statutory frameworks cited by the *Smith* court as exemplary for limiting frequent and frivolous claims.<sup>235</sup> None of the states highlighted by the Indiana Supreme Court outright bar a court from processing a suit due to a litigant’s status as an indigent inmate and number of previous frivolous suits filed.<sup>236</sup> Generally, the highlighted states empower courts to deem certain litigants vexatious,<sup>237</sup> but they leave the courts discretion

227. *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 809 n.5 (Ind. 2008); *see also Mitchell v. Moore*, 786 So. 2d 521, 525 (Fla. 2001).

228. *See Lewis v. Sullivan*, 279 F.3d 526, 528 (7th Cir. 2002).

229. *Lukens*, *supra* note 221, at 478. *Lukens* asserts that the federal three strikes provision does not comport with the federal Constitution under due process and equal protection grounds. *Id.* at 520.

230. 135 F. Supp. 2d 954 (W.D. Wis. 2001), *rev’d*, 279 F.3d 526 (7th Cir. 2002).

231. *Id.* at 969.

232. *Lewis*, 279 F.3d at 528 (7th Cir. 2002). As the focus of this Note is to examine these types of provisions through the separate lens of the open courts clauses found in some state constitutions, it is outside the scope of this Note to further explore the challenges made in federal courts via the Constitution against the federal Prison Litigation Reform Act.

233. *Id.* at 529.

234. *Compare* 28 U.S.C. § 1915(g) (2006), *with* IND. CODE § 34-10-1-3 (2011).

235. *See Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 808-09 (Ind. 2008).

236. Colorado most closely approaches Indiana’s law by precluding indigent inmates from filing suits involving prison conditions after three prior suits regarding prison conditions have been deemed frivolous. *See* COLO. REV. STAT. § 13-17.5-102.7(1) (2010).

237. *See, e.g.,* FLA. STAT. ANN. § 68.093 (West, Westlaw through 2010 2d Leg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 11.101 (West, Westlaw through 2009 Reg. Sess.).

on whether to allow claims to proceed after a litigant has been deemed vexatious, depending on the merits of his case.<sup>238</sup> In terms of monetary deterrence, these states authorize courts to require a litigant to furnish a security in order to move forward with a tenuous or questionable claim.<sup>239</sup> Alternatively, courts may hold inmate filers responsible for the entire payment of a filing fee over time<sup>240</sup> rather than prior to filing their claim.<sup>241</sup> Frameworks such as these could be more effective and better adhere to the constitutional requirements of Indiana’s open courts clause.

#### IV. ANALYSIS AND RECOMMENDATIONS

##### *A. Effectiveness of Indiana’s Three Strikes Law*

The Office of the Indiana Attorney General maintains an online database of inmate complaints deemed frivolous.<sup>242</sup> According to the Frivolous Claims Law,<sup>243</sup> the court clerk is to send a copy of the order to the Indiana Attorney General and Department of Correction upon the court’s determination that an inmate’s suit may not proceed.<sup>244</sup> The database reflects copies of orders submitted to the Attorney General’s office by court clerks. In most entries, the database provides a link to a copy of the court’s order.

According to the database, approximately eighty-two<sup>245</sup> inmate plaintiffs have had claims dismissed under the Frivolous Claims Law.<sup>246</sup> Of these inmates, eight have a “screened out case count” of three or more.<sup>247</sup> A “screened out” case is one that has been precluded under the Frivolous Claims Law.<sup>248</sup> For example, Eric D. Smith, the inmate who successfully argued the unconstitutionality of the original Three Strikes Law, has ten entries in the database.<sup>249</sup> James H. Higgason, Jr. appears to be the state’s most prolific frivolous filer, with twenty-one entries in the database.<sup>250</sup>

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238. See, e.g., DEL. CODE ANN. tit. 10, § 8803(e) (West, Westlaw through 2010 Leg.); TEX. CIV. PRAC. & REM. CODE ANN. § 11.102.

239. See, e.g., CAL. CIV. PROC. CODE § 391.3 (2010); FLA. STAT. ANN. § 68.093(3)(a).

240. See, e.g., COLO. REV. STAT. § 13-17.5-103; FLA. STAT. ANN. § 57.085(5).

241. See IND. CODE § 34-10-1-3 (2011).

242. *Offender Litigation Screening*, *supra* note 62.

243. IND. CODE § 34-58-1-2.

244. *Id.* § 34-58-1-4.

245. The database lists eighty-four inmate plaintiffs separately, but upon examination it appears that inmates “Cole, John” and “Cole, John C.” may be the same inmate. “Wilson, Shavaughn Carlos” and “Wilson-El, Shavaughn Carlos” are also very likely the same inmate, with orders listed separately on each account.

246. *Offender Litigation Screening*, *supra* note 62.

247. *Id.*

248. See *id.*

249. *Id.*

250. *Id.*



The database illustrates that courts are actively using the Frivolous Claims Law as a tool to limit meritless inmate litigation. It also illustrates that there appear to be very few prolific frivolous filers in the state. Additionally, the database highlights shortcomings of the Three Strikes Law.

There is always the possibility of error in reporting the screened out cases. For example, there are eighty-four inmates listed in the database, but inmates “Cole, John” and “Cole, John C.” may be the same person. Each of those entries has one screened out case, but only John C. Cole has a litigation order attached to his name within the online database, so it is not clear if they are the same person. If they are the same person, then John C. Cole actually has two screened out cases, and he is one, rather than two, filings away from meeting the three strikes limit. Similarly, inmates “Wilson, Shavaughn Carlos” and “Wilson-El, Shavaughn Carlos” are very likely the same inmate.<sup>251</sup> “Wilson, Shavaughn Carlos” has four screened out cases, so he is subject to the Three Strikes Law.<sup>252</sup> “Wilson-El, Shavaughn Carlos” has one screened out case.<sup>253</sup> If these separate entries stem from the same individual, then Shavaughn Carlos Wilson-El actually has a total of five filings that have been screened out.

The effectiveness of the database depends not only on the accuracy of the entries, but also on each county clerk actually submitting a screened out inmate case to the Attorney General. In the *Smith* appellate opinion, the court noted that it may be unbeknownst to a trial court if an inmate has already had more than three cases dismissed under the Frivolous Claims Law in different county courts.<sup>254</sup> The 2006 appellate opinion also stated that at that time, there was no “central information system” for trial courts to check.<sup>255</sup> Now that the Attorney General maintains this central information system, its accuracy depends on county clerks submitting applicable cases. Additionally, the database—and the Three Strikes Law itself—cannot be effective unless courts know to consult the database when processing an indigent inmate claim.

If the goal of the Three Strikes Law is to conserve financial and judicial resources, it is not clear that the 2009 version will do so. As the Indiana Supreme Court discussed when ruling on the constitutionality of the original Three Strikes Law, the amended law still does not seem to alleviate the work of the courts.<sup>256</sup> Regardless of whether an inmate’s claim is deemed frivolous, and how many prior cases the inmate has had screened out, a court reviewing an indigent

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251. In some of the litigation orders attached to the “Wilson” inmate, he is identified as “Wilson-El” in the order caption. See *Wilson-El v. Abell*, No. 77D01-0611-SC-01072 (Sullivan Super. Ct. Nov. 17, 2006), available at <http://12.186.81.50/legal/litigation/litscreen/pub/378806.1.pdf>; *Wilson-El v. Hanks*, No. 77D01-0507-SC-00563 (Sullivan Super. Ct. Aug. 3, 2005), available at <http://12.186.81.50/legal/litigation/litscreen/pub/378803.1.pdf>.

252. *Offender Litigation Screening*, *supra* note 62; IND. CODE § 34-10-1-3 (2011).

253. *Offender Litigation Screening*, *supra* note 62.

254. *Smith v. Ind. Dep’t of Corr.*, 853 N.E.2d 127, 132 (Ind. Ct. App. 2006), *rev’d*, 883 N.E.2d 802 (Ind. 2008).

255. *Id.* at 132 n.7.

256. See *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 810 (Ind. 2008).

inmate’s complaint still must use time and resources to determine whether the inmate is subject to the Three Strikes Law.<sup>257</sup> The court must also determine if the inmate asserts “immediate danger of serious bodily injury.”<sup>258</sup> The amended law may cause inmates to be more careful about filing suits to avoid three strikes.<sup>259</sup> However, once an inmate meets the three strikes, he can still continue to barrage the court system with complaints, as an indigent or not, which requires some sort of an initial review by a court. The Frivolous Claims Law already addresses judicial economy by allowing meritless inmate claims to be dismissed without even serving the defendant with the complaint.<sup>260</sup> Therefore, the amended Three Strikes Law does not preserve judicial resources in any meaningful way. All that the amended Three Strikes Law adds to the framework is that courts are forced to dismiss a case where an indigent inmate does assert a viable claim, and only because the inmate has historically asserted unviable claims.<sup>261</sup>

In another illustrative case appealed by inmate Eric Smith, the Indiana Court of Appeals noted that Smith had filed more than one suit per month in Henry County, where the New Castle Correctional Facility is located, and he had more than fifty cases on appeal.<sup>262</sup> The court of appeals echoed the trial court’s frustration with Smith and agreed that “there is little reason to believe anything Smith says or writes.”<sup>263</sup> Nonetheless, the court reversed the trial court’s dismissal under the Frivolous Claims Law regarding Smith’s cruel and unusual punishment claims.<sup>264</sup> Since Smith stated a valid legal theory and alleged specific injuries, the screening level was too early to dismiss the claim; here, the dismissal could only be based on judicial speculation due to Smith’s identity and penchant for filing frivolous suits.<sup>265</sup> The court of appeals ruled on this particular Smith suit in June 2009,<sup>266</sup> the interim time period when there was no Three Strikes Law in effect.<sup>267</sup> However, even if this particular claim had been subject

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257. *See id.*

258. IND. CODE § 34-10-1-3 (2011).

259. *See* Lukens, *supra* note 221, at 498 (discussing that as prisoners become aware of the federal Three Strikes Law, they will have to consider whether pursuing an allegation is worth the possibility of “exhausting one of those strikes, and risking their ability to vindicate some later, and perhaps more egregious . . . treatment”).

260. *See* IND. CODE § 34-58-1-2.

261. *See id.* § 34-10-1-3; *see, e.g.*, Lukens, *supra* note 221, at 472 (discussing the federal Prison Litigation Reform Act and noting that its three strikes provision precludes meritorious claims).

262. Smith v. Wrigley, 908 N.E.2d 354, 359 (Ind. Ct. App. 2009).

263. *Id.*

264. *Id.* at 360.

265. *Id.*

266. *See id.*

267. The first version of the Three Strikes Law was held unconstitutional by the Indiana Supreme Court in April 2008. *See* Smith v. Ind. Dep’t of Corr., 883 N.E.2d 802 (Ind. 2008). The amended version of the Three Strikes Law went into effect in July 2009. *See* IND. CODE § 34-10-1-



to the Three Strikes Law, Smith's allegations of staff purposely scalding him during showers and forcing him to walk with a broken ankle in shackles<sup>268</sup> could arguably have fallen within the "immediate danger of serious bodily injury"<sup>269</sup> exception to the Three Strikes Law.<sup>270</sup> Ultimately, the truly prolific filers like Smith will continue to file claims, whether or not there are limits such as the Frivolous Claims Law and the Three Strikes Law.

Although the database does not likely reflect each and every screened out filing, the prevalence of offenders who meet or exceed the three strikes limit—seven inmates out of a population of approximately 28,000 Indiana adult offenders<sup>271</sup>—suggests that the frivolous filers that the Three Strikes Law addresses are few and far between.<sup>272</sup> Those who are truly prolific, such as Smith and Higgason, or those who have just met or exceeded three strikes, such as Shavaughn Carlos Wilson-El, will not likely be deterred by the Three Strikes Law. Even though these inmates have at least three screened out cases, they continue to file and are not bothered by already having three strikes. They persist with claims, requiring a court to determine if the filer has had three strikes, and if so, whether an allegation of serious bodily injury enables the claim to proceed.

#### *B. Constitutionality of Indiana's 2009 Three Strikes Law*

Under the new version of the Three Strikes Law, if a court determines that an indigent inmate filer has already had three claims dismissed as frivolous and asserts no immediate danger of bodily injury, the court is *entirely foreclosed* from processing the claim—even if it is a meritorious and viable cause of action recognized by law.<sup>273</sup> Under the reasoning set forth in *Smith*, the newly enacted version of the law still does not seem to comport with the open courts clause. Specifically,

“where a cause of action has been created (by constitution, statute, or

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3 (2011.)

268. *Wrigley*, 908 N.E.2d at 358.

269. IND. CODE § 34-10-1-3.

270. *Cf. Lukens*, *supra* note 221, at 497 (discussing the “imminent danger of serious physical injury” requirement under the federal three strikes law and noting the difficulty of meeting this exception since “the imminence of the alleged danger likely will have dissipated” by the time the inmate files a complaint).

271. The Indiana Department of Correction reported that on December 1, 2009, there were 25,791 adult male offenders and 2411 adult female offenders incarcerated with the Department. IND. DEP'T OF CORR. DIV. OF RESEARCH & PLANNING, OFFENDER POPULATION STATISTICAL REPORT (2009) (on file with author).

272. *Cf. Lukens*, *supra* note 221, at 490 (positing that the so-called “explosion” of prisoner litigation in federal courts can be explained by the overall “explosion” of state and federal prison populations).

273. IND. CODE § 34-10-1-3; *see, e.g., Lukens*, *supra* note 221, at 472 (discussing the federal Prison Litigation Reform Act and noting that its three strikes provision precludes meritorious claims).

common law), courts must be open to provide remedy by due course of law.” Thus, although there is no right under the [o]pen [c]ourts [c]ause to any particular cause of action and the legislature may create, modify, or abolish a particular cause of action, *to the extent there is an existing cause of action, the courts must be open to entertain it.*<sup>274</sup>

Essentially, Indiana adopted the federal three strikes framework targeting indigent inmates filing multiple suits.<sup>275</sup> Based on the *Smith* majority’s suggestion that legislative conditions on access to courts are permissible<sup>276</sup> and that “other courts have upheld other less stringent methods, such as requiring filing fees, to deter frivolous filing if that is a concern,”<sup>277</sup> it may seem that the new statute should withstand scrutiny under the open courts clause.<sup>278</sup> However, Indiana’s new law still operates as an “indiscriminate statutory ban”<sup>279</sup> against potential claims of indigent inmates. The open courts clause requires “an individualized assessment of each claim . . . and a claim cannot be dismissed on the basis of who presents it rather than whether it has merit.”<sup>280</sup>

The new version of the law *still* requires a court to dismiss a suit based on who presents it—an inmate filing as indigent with three previous frivolous suits—rather than its merit.<sup>281</sup> It prohibits a court from proceeding with an indigent inmate’s claim even if the court thinks the claim may be viable.<sup>282</sup> In this regard, the law compromises the independence of the state judiciary, which is what the open courts clause historically sought to protect.<sup>283</sup> Even as amended, the law is still unconstitutional under the open courts clause; it serves as an indiscriminate statutory ban based on who presents the claim, and it interferes with the independence of the judiciary by forcing courts to dismiss claims that

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274. *Smith v. Ind. Dep’t of Corr.*, 883 N.E.2d 802, 810 (Ind. 2008) (internal citation omitted).

275. *Compare* 28 U.S.C. § 1915(g) (2006), *with* IND. CODE § 34-10-1-3.

276. *See Smith*, 883 N.E.2d at 809.

277. *Id.* at 810.

278. Indeed, in April 2010, the Indiana Court of Appeals reviewed and upheld the constitutionality of the 2009 version of the Three Strikes Law after a Henry County trial court utilized Indiana Code section 34-10-1-3 to prevent Eric Smith from filing a claim as an indigent. *Smith v. Wrigley*, 925 N.E.2d 747, 748 (Ind. Ct. App. 2010). The court of appeals determined that the revised statute comported with the open courts clause of the Indiana Constitution. *Id.* at 749-50. In its rationale, the court quoted the Indiana Supreme Court’s statement in *Smith v. Indiana Department of Correction* that the legislature can “impose filing fees as conditions to be met before judicial relief is available” and that federal law provides for the same exclusion based on filing frequency and filing in forma pauperis. *Smith*, 883 N.E.2d at 808. On August 27, 2010, the Indiana Supreme Court denied transfer of this case. *Wrigley*, 940 N.E.2d 822 (Ind. 2010).

279. *Smith*, 883 N.E.2d at 809.

280. *Id.* at 806.

281. *See* IND. CODE § 34-10-1-3 (2011).

282. *See id.*; *see also* Lukens, *supra* note 221, at 472 (noting that the PLRA’s three strikes provision precludes meritorious claims).

283. Hoffman, *By the Course of the Law*, *supra* note 32, at 1316.



may have otherwise been redressable by law.<sup>284</sup>

Other state frameworks could be more effective and more in adherence with Indiana's open courts clause. None of the state jurisdictional schemes cited as exemplary in *Smith* prohibit the filing of complaints from the onset in the same manner as Indiana.<sup>285</sup> Rather, the statutes leave the ultimate discretion to the courts.<sup>286</sup> For example, California requires vexatious litigants to gain permission of the court before filing future claims.<sup>287</sup> Essentially, California uses a pre-filing review process similar to Indiana's Frivolous Claims Law, but not limited merely to inmate filers. Hawaii has basically the same framework as California.<sup>288</sup> Delaware's analogous law, like Indiana's Frivolous Claims Law, enables a court to dismiss an action on similar grounds, but it applies to all in forma pauperis litigants, not just inmates.<sup>289</sup> Like California, Delaware also requires vexatious in forma pauperis litigants to obtain judicial permission prior to filing.<sup>290</sup> Texas's and Florida's laws address inmate litigation specifically, as well as the broader category of frivolous lawsuits filed by any vexatious pro se litigant.<sup>291</sup> Florida, like Indiana, also imposes earned-time credit reduction as a possible sanction for frivolous filing.<sup>292</sup> Additionally, Florida requires that an inmate be responsible for the entire filing fee over time,<sup>293</sup> whereas Indiana requires an indigent inmate to pay a portion of the filing fee.<sup>294</sup>

### C. Recommendations

Indiana should abandon its Three Strikes Law and enable courts to impose other requirements to limit and deter frivolous and multiple filers, not just indigent inmates. As a starting point, Indiana already has a pre-filing screening process for inmate claims.<sup>295</sup> To address the issue of frivolous or vexatious filing generally, it would be beneficial to equip courts with broader screening and filtering devices to address all vexatious or frivolous filers. Indiana could enact a general procedure for determining whether a litigant is a frivolous or vexatious

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284. See *Smith*, 883 N.E.2d at 809-10.

285. See IND. CODE § 34-10-1-3.

286. See, e.g., DEL. CODE ANN. tit. 10, § 8803(e) (West, Westlaw through 2010 Leg.); FLA. STAT. ANN. § 68.093 (West, Westlaw through 2010 2d Leg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. § 11.102 (West, Westlaw through 2009 Reg. Sess.).

287. CAL. CIV. PROC. CODE § 391.7 (2010).

288. See HAW. REV. STAT. ANN. § 634J-1 (West, Westlaw through 2010 legislation).

289. DEL. CODE ANN. tit. 10, § 8803.

290. *Id.* § 8803(e).

291. See FLA. STAT. ANN. § 68.093(3)(a); *id.* § 944.279(1); TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(1); see also Neveils, *supra* note 164, at 353.

292. FLA. STAT. ANN. § 944.28.

293. *Id.* § 57.085.

294. IND. CODE § 33-37-3-3(b) (2011).

295. *Id.* § 34-58-1-2.

filer and require pre-screening of those claims.<sup>296</sup> A court would have an opportunity prior to the filing to determine if the suit has merit and, if not, it could dismiss the suit as frivolous or require the plaintiff to furnish a security, as is done in Texas and Florida.<sup>297</sup>

To specifically deter frivolous, frequent inmate filers, Indiana could deduct the entire court filing fee from inmate accounts as available over time, not just a portion of the filing fee as Indiana law currently provides.<sup>298</sup> Although Florida deducts the full fee from an inmate's account from his first suit onward,<sup>299</sup> Indiana could choose to do so only after three suits have been deemed frivolous. Holding the inmate responsible for the entire filing fee over time—even if the claim is immediately screened out under the Frivolous Claims Law—should provide deterrence against the state's frequent inmate filers, who submit claim after claim as indigents and are currently only responsible for a portion of the fee.<sup>300</sup> For those who are not deterred by payment provisions,<sup>301</sup> the Indiana Department of Correction can revoke the frivolous litigant's earned credit time as a deterrence mechanism.<sup>302</sup> After a one year hiatus from doing so, the Department's plan to reinstate the punishment of revoked earned credit time, in response to judicial pressure,<sup>303</sup> suggests that this is an effective method to deter inmates from frivolous filings.

Repealing the current Three Strikes Law, enacting legislation to address and limit any vexatious and frivolous filers, and requiring inmates to pay for their entire filing fee over time would empower Indiana courts; they would be able to handle frivolous litigation in a manner that deters frivolous filing but still enables all litigants to have their claims reviewed. Furthermore, this approach would not infringe on a court's ability to process claims that have stated a valid cause of action or are otherwise meritorious, as is required now by the Three Strikes Law.

### CONCLUSION

Indiana's amended Three Strikes Law still conflicts with the open courts clause of the Indiana Constitution. The law still denies a group of citizens—indigent inmates—court access to assert a cause of action because they have historically asserted unrecognizable claims. It impermissibly interferes with

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296. See Neveils, *supra* note 164, at 357 (discussing Florida's Vexatious Litigant Law as an efficient process for disposing of frivolous suits, with sufficient safeguards to protect litigants' access to the courts); see also Colby, *supra* note 140, at 1351-52 (concluding that Texas's Vexatious Litigants Statute will reduce frivolous claims and does not unfairly restrict court access).

297. See FLA. STAT. ANN. § 68.093(3)(a); TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.051 to -.055 (West, Westlaw through 2009 Reg. Sess.).

298. IND. CODE § 33-37-3-3(b).

299. See FLA. STAT. ANN. § 57.085(5).

300. See IND. CODE § 33-37-3-3(b).

301. See *Spencer v. Fla. Dep't of Corr.*, 823 So. 2d 752, 756 (Fla. 2002).

302. See IND. CODE § 35-50-6-5(a)(4).

303. See E-mail from Sarah Schelle, *supra* note 80.



the independence of the judiciary by requiring Indiana courts to review and then close their doors on complaints that could assert otherwise recognizable and redressable claims. Additionally, the amended law still does not effectively help alleviate the work of the state judiciary because a court must spend time determining if an inmate has three prior strikes and has alleged immediate danger of serious bodily injury.

If the Indiana legislature truly wants to address the issue of frivolous or vexatious suits in a constitutional and effective manner, it should abandon the Three Strikes Law. The legislature should instead adopt laws that address frivolous or vexatious filers generally. Rather than strictly limiting the law to indigent inmates, the legislature should let the courts decide whether to allow future claims by any such filer to proceed. If the legislature wants to impose an additional deterrent on inmate filers that comports with the open courts clause, it should hold repeatedly frivolous inmate filers responsible for their entire filing fees over time as funds become available. The best course of action is not to preclude these litigants from filing in the first place solely because of their indigence and history of "striking out" on prior claims.

















